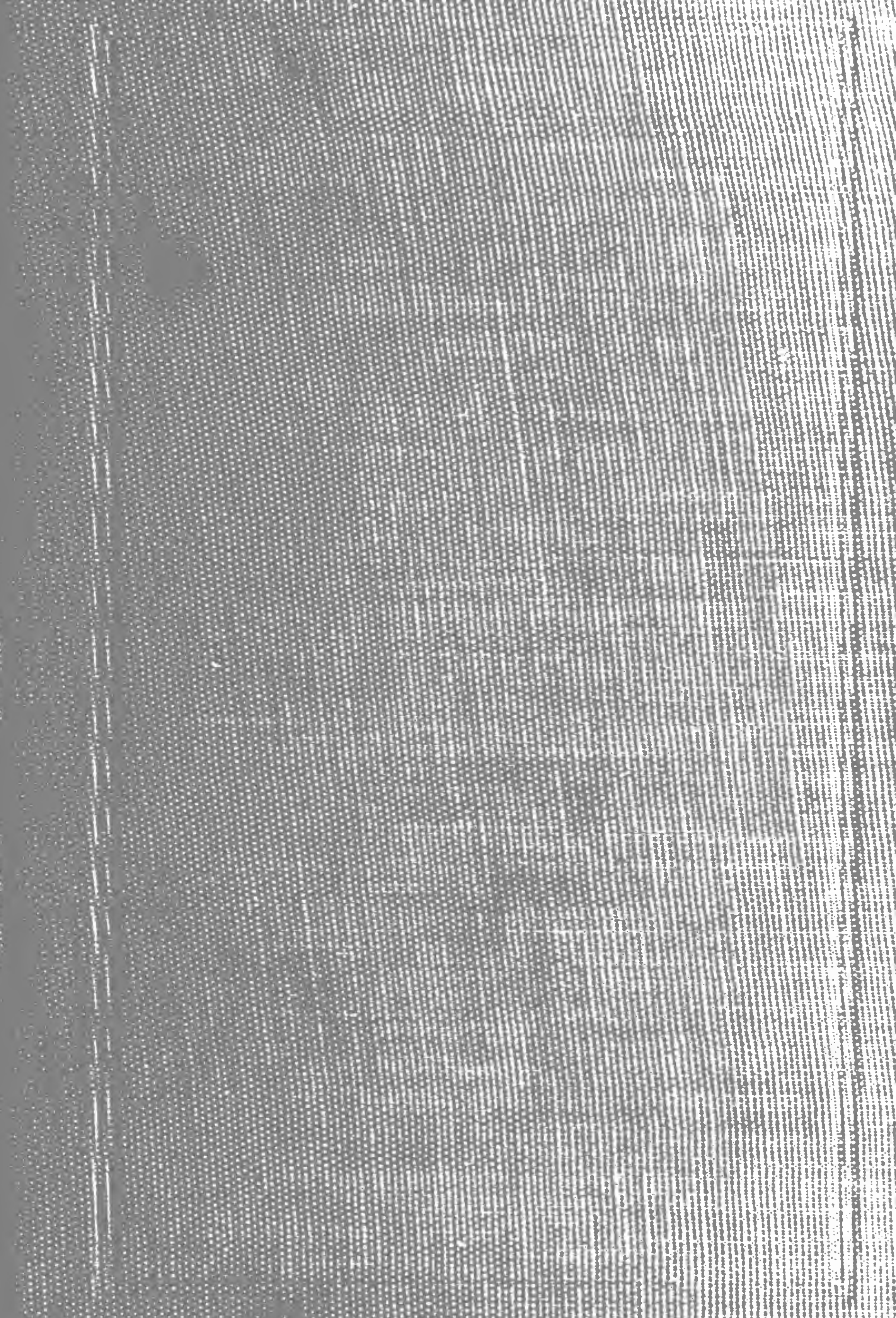

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United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of DAVID A. JACOBSON, Bankrupt.

KATIE WERNER,

Petitioner,

vs.

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK & TRUST COMPANY, a Corporation, and NORTHERN TRUST COMPANY, a Corporation,

Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Arizona, and Transcript of Record in Support Thereof.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. ——.

In the Matter of DAVID A. JACOBSON, Bankrupt.

KATIE WERNER, Petitioner, vs. HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK & TRUST COMPANY, a Corporation, and NORTHERN TRUST COMPANY, a Corporation, Respondents.

In re Petition of KATIE WERNER to Superintend and Revise.

PETITION.

The Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Katie Werner respectfully shows unto the Court: That on the 25th day of July, 1923, David A. Jacobson filed his voluntary petition in bankruptcy in the District Court of the United States for the Federal District of Arizona, Phoenix Division, said cause being No. B-282, and on the 31st day of July, 1923, he was duly adjudged to be bankrupt by the said United States District Court and on the same date said cause was referred generally to R. W. Smith, a referee in bankruptcy in said district; that Homer F. Allen is the trustee of said bankrupt's estate.

That your petitioner is a creditor of said David A. Jacobson, bankrupt, the indebtedness to her consisting of two promissory notes for $2,000.00 each, with interest, said notes being secured by second [1*] mortgages upon lot 25 and upon lots 26, 27 and 28, respectively, all of the town of Chandler, Maricopa County, State of Arizona, in said federal district.

That Phoenix Savings Bank & Trust Company, a corporation, is a creditor of said bankrupt, the indebtedness to it consisting of a promissory note for $10,000.00, with interest and accruals, said note being secured by first mortgage upon lot 25 aforesaid.

That Northern Trust Company, a corporation, is a creditor of said bankrupt, the indebtedness to it consisting of a promissory note for $10,000.00, with interest and accruals, said note being secured by first mortgage upon lots 26, 27 and 28 aforesaid.

That during the course of the administration of said bankrupt's estate and on, to wit, the 20th day of November, 1923, bankrupt's trustee, Homer F. Allen, petitioned said referee for an order to show cause upon your petitioner why an order should not be made and entered authorizing him to sell lots 25, 26, 27 and 28, Town of Chandler, Maricopa County, Arizona, being real property of the bankrupt, free and clear of liens and encumbrances, said liens and encumbrances to be transferred to the proceeds of the sale thereof conditioned upon the

*Page-number appearing at foot of page of original certified Petition for Revision.

purchase price at trustee's sale of said lots 25, 26, 27 and 28 being sufficient to pay all liens and encumbrances.

That on, to wit, the 21st day of November, 1923, said referee made and entered an order directing this petitioner to appear before him on the 3d day of December, 1923, at 10:00 A. M. to show cause why the trustee should not be authorized to sell the afore-described property free and clear of all liens and [2] encumbrances, conditioned upon the purchase price at trustee's sale being sufficient to pay all of the liens and encumbrances against said realty.

That on, to wit, the 3d day of December, 1923, your petitioner appeared before said referee as ordered to do and made no objection to an order for the sale of said real estate free and clear of liens and encumbrances, and conditioned upon the purchase price being sufficient to pay all liens and encumbrances, and hearing on the petition for sale and order to show cause aforesaid was had and completed on said date before said referee.

That on the 18th day of December, 1923, without further notice to your petitioner, said referee signed and filed in this cause his order dated December 3, 1923, authorizing and directing the trustee to sell said real estate at public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, within ninety days from and after the 10th day of November, 1923, free and clear of all liens and en-

cumbrances; but wholly failed to direct that said sale be conditioned upon the purchase price being sufficient to pay all liens and encumbrances.

That thereafter the trustee published notice that he would sell at trustee's sale on Thursday, February 7, 1924, to the highest bidder for cash the herein described real estate, in his office, rooms 411–412 National Bank of Arizona Building, Phoenix, Arizona, requiring ten per cent of the amount to accompany each [3] bid, sale to be subject to confirmation by the Bankruptcy Court and reserving to himself the right to reject any and all bids. No notice of such proposed sale was given to the creditors of bankrupt as is required by law.

That on the 7th day of February, 1924, no sale at all was had or held by said trustee at his office but one Arthur E. Price, as attorney for Phoenix Savings Bank & Trust Company and Northern Trust Company, aforesaid, appeared there desiring to bid before the referee at the latter's office, all of which occurred prior to 10:00 o'clock in the morning on said date; that still prior to 10:00 o'clock in the morning of said date said trustee and said prospective bidder repaired to the office of the referee, R. W. Smith, at room 208 Heard Building, Phoenix, Arizona, where, at the hour of 10:00 o'clock A. M., said 7th day of February, 1924, said attorney made a bid of $15,527.64 for lot 25 and a bid of $15,547.70 for lots 26, 27 and 28 on behalf of said corporations, respectively, which bids were at said hour and place accepted by the trustee.

That on, to wit, the 3d day of March, 1923, said trustee made and filed his return of the herein described sale, and on the same date, then and there, without notice to your petitioner, said referee, by his order, confirmed the sale and ordered the trustee to pay to Phoenix Savings Bank & Trust Company $14,103.97, the amount of its first mortgage upon lot 25, with accruals, and to pay as expenses of sale, including $776.28, as trustee's attorney's fees, $1189.85, being [4] a total of $15,293.82, payable out of the proceeds of sale of lot 25 aforesaid; and to pay to Northern Trust Company $14,322.50, the amount of its first mortgage upon lots 26, 27 and 28, and to pay as expenses of sale, including $777.39 as trustee's attorney's fees, $1193.15, being a total of $15,515.65, payable out of proceeds of sale of lots 26, 27 and 28 aforesaid. That the purchase price obtained by said sale of lots 25, 26, 27 and 28 was wholly insufficient to pay all of the liens and encumbrances thereupon and insufficient to pay in whole or in part the second mortgages of your petitioner.

That thereafter, and on the 13th day of October, 1924, your petitioner, Katie Werner, petitioned said referee for his order setting aside and holding for naught the hereinbefore mentioned order of sale, the sale, and the order confirming sale and in said petition requested said referee for his order upon said trustee, Phoenix Savings Bank & Trust Company and Northern Trust Company, to show cause why said petition should not be granted,

which petition was duly served upon said respondents and no answer was made thereto.

That on the 8th day of November, 1924, said referee, without issuing the requested order to show cause and without hearing said petition or taking evidence thereon, dismissed same for want of jurisdiction, although, as a matter of law, he had jurisdiction, to which order of dismissal your petitioner then duly excepted.

Your petitioner further avers that on the 17th day of November, 1924, she filed in the District Court [5] of the United States for the Federal District of Arizona her petition for the review of the acts, conduct and order of said referee dated the 8th day of November, 1924, representing that the referee had erred in this, to wit, he failed to issue his order to show cause upon said petition; he arbitrarily acted upon said petition without full and complete hearing and receiving evidence thereon and he dismissed the petition, whereas he should have issued an order to show cause upon said petition and have received and preserved all evidence and testimony in connection therewith. That said petition for review was on said 17th day of November, 1924, duly served upon said trustee, Phoenix Savings Bank & Trust Company and Northern Trust Company but none of them made written answer thereto or tendered issue thereon.

Thereafter the referee duly certified his record in this cause to the District Court of the United States at Phoenix, Arizona, whereupon said petition for review duly coming on for argument on the

8th day of December, 1924, the said District Court of the United States, the Honorable F. C. Jacobs, Judge, thereafter, on the 9th day of December, 1924, made and entered his order denying said petition for review and confirming the referee's orders theretofore made; to which ruling of the Court your petitioner then and there duly excepted.

Your petitioner tenders herewith and files in support of and as part of this petition a true copy of the necessary record in this cause as it appears in [6] the office of the Clerk of the District Court of the United States for the Federal District of Arizona, at Phoenix, Arizona, duly certified to by said Clerk under his hand and seal of office, consisting of

(1) Order adjudication and reference.
(2) Petition for order of sale.
(3) Order to show cause.
(4) Order of sale.
(5) Return of sale.
(6) Order confirming sale.
(7) Petition of Katie Werner for order setting aside sale, etc.
(8) Proof of service of petition to set aside sale.
(9) Referee's order dismissing petition of Katie Werner to set aside sale.
(10) Exceptions to order of referee denying and dismissing petition to set aside order of sale.
(11) Petition for review.
(12) Proof of service of petition for review.
(13) Order denying petition for review.

(14) Exceptions by Katie Werner to order denying petition for review.

(15) Notice of petition to superintend and revise.

Your petitioner avers that said order and decree of the said United States District Court for the Federal District of Arizona made and entered on the 9th day of December, 1924, was and is erroneous in matters of law, in that

(a) The facts shown by the petition to set aside order of sale, sale and order confirming same filed [7] with the Referee by your petitioner on October 13, 1924 (which must be taken as true in the absence of any denial thereof), would necessitate the setting aside of the sale and, therefore, constituted a valid cause of action on the part of your petitioner. The only action that the Referee could have lawfully taken would have been to cite the trustee and purchaser to show cause why the petition should not have been granted and if then said respondents raised any issue of fact, to have received all of the evidence, preserved same and made his findings and orders on the merits thereof. The order of the District Court denying the petition for review upheld the procedure of the Referee in summarily dismissing the petition, when the Referee should have been directed to issue the order to show cause requested and to receive all evidence and preserve the same and in all respects give the petitioner her day in court by full and complete hearing on her said petition.

(b) The District Court, in confirming the orders of the Referee, held the order of sale by the Referee

valid, whereas, as a matter of law, the Referee had no jurisdiction to make the order. His jurisdiction was based upon an order for your petitioner to show cause why an order of sale of the real property for a price sufficient to pay the amount of her lien in full should not be made, to which order she had no objection but, contrary thereto, the Referee made an order for the sale of the real property herein described free and clear of liens but without ordering that the purchase price be sufficient to pay her lien in full. The only jurisdiction [8] had by the Referee was to make an order for sale based on the trustee's petition and the order to show cause issued thereon, and none other. No notice of any proposed sale was given to creditors as provided by the Bankruptcy Act. The notice of the trustee's petition for sale given was not compliance therewith.

(c) The sale by the trustee was void as a matter of law, in that the order of the Referee provided that the sale should be at public auction in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, whereas the sale was in fact a private sale and held at a place other than specified by said trustee, without due and lawful postponement or adjournment thereof. Under General Order No. 18 of the Supreme Court of the United States, and the order of sale made by the Referee, this sale was, as a matter of law, invalid and the District Court had no power to confirm same.

(d) By the order and decree of said United States District Court, your petitioner was in fact deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The District Court erred in denying the petition for review of Katie Werner.

The District Court erred in entering his order confirming the action of the Referee in confirming the sale.

That your petitioner on the 11th day of December, 1924, caused to be served upon the trustee, Homer F. Allen, [9] a notice that this petition to superintend and revise would be filed in due course by delivering a true copy thereof to his attorney of record, A. Henderson Stockton, and has also caused said notice to be served upon Phoenix Savings Bank & Trust Company and Northern Trust Company, corporations, by the mailing of true copies thereof to the attorney of record for said corporations, Arthur E. Price, at Chandler, Arizona, by registered mail.

WHEREFORE, your petitioner feeling aggrieved because of said order and decree of the District Court of the United States for the Federal District of Arizona, prays that the same may be revised in matter of law by your Honorable Court, as provided in paragraph 24-b of the Bankruptcy

Law of 1898 and the rules and practice in such case made and provided.

KATIE WERNER.

F. W. ZIMMERMAN,
D. V. MULHERN,
Counsel for Petitioner.

United States of America,
Federal District of Arizona,—ss.

Katie Werner, the petitioner mentioned and described in the foregoing petition, does hereby make solemn oath that the statements of fact therein contained are true of her own knowledge, save and except the statements therein made on information and belief and as to them, they are true to the best of her knowledge, [10] information and belief.

KATIE WERNER.

Subscribed and sworn to before me this 16th day of December, 1924.

[Seal] L. J. BROOKS,
Notary Public, in and for the County of Maricopa, State of Arizona, in said Federal District.
My commission expires Aug. 2d, 1925. [11]

In the District Court of the United States, for the District of Arizona.

No. B-282 (PHOENIX).

In the Matter of DAVID A. JACOBSON, Bankrupt.

ORDER OF ADJUDICATION AND REFERENCE.

At Phoenix, in said District, on the 31st day of July, 1923, before the Honorable Fred C. Jacobs, Judge of the said court in bankruptcy, the petition of David A. Jacobson that he be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been duly heard and considered, the said David A. Jacobson is hereby adjudged a bankrupt accordingly.

And it is therefore ORDERED that the said matter be referred to R. W. Smith, Esq., one of the Referees in Bankruptcy of this court, Heard Building, Phoenix, Arizona, to take such further proceedings therein as are required by said act, and that the said David A. Jacobson shall attend before said referee on the 15th day of August, 1923, at Phoenix, Arizona, in said District and shall thenceforth submit to such orders as may be made by said Referee or by this court relating to bankruptcy.

WITNESS the Honorable FRED C. JACOBS, Judge of the said court and the seal thereof at Phoenix, in said District on the 31st day of July, 1923.

[Seal] C. R. McFALL,
Clerk.
By Paul Dickason,
Chief Deputy Clerk.

(Endorsed on back:) No. B-282. United States District Court, [12] District of Arizona. In Bankruptcy. In the Matter of David A. Jacobson, Bankrupt. Order of Adjudication and Reference. Zimmerman & Mulhern, Attorneys for Bankrupt.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of Order of Adjudication and Reference, in the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

WITNESS my hand and the seal of said Court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [13]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-279 (PHOENIX).

In the Matter of DAVID A. JACOBSON, Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE WHY REAL PROPERTY SHOULD NOT BE SOLD FREE AND CLEAR OF LIENS, AND PETITION FOR SALE OF REAL PROPERTY FREE AND CLEAR OF LIENS.

The petition of Homer F. Allen respectfully represents and shows:

(1) That your petition was heretofore and on the 20th day of Sept. 1923, duly elected and approved trustee in bankruptcy of all of the property of the above-named bankrupt, and your petitioner did qualify as such trustee by filing his bond in the amount fixed by the Referee in Bankruptcy, which said bond has been approved, and said trustee is now, and since the approval of said bond has been, the duly elected, approved, qualified and acting trustee in bankruptcy of David A. Jacobson, Bankrupt.

(2) That title was vested in David A. Jacobson on the date of bankruptcy herein to the following described property situate in the County of Maricopa, State of Arizona, to wit:

Lots 25, 26, 27, 28, 36, 37, 38 and 39, Town of Chandler, Maricopa County, Arizona, according to the map or plat thereof on file and of record in the office of the County Recorder of Maricopa County, Arizona;

East half of the southwest quarter of Section 10, Township 2 South, Range 5 East of the Gila and

Salt River [14] Base and Meridian, in Maricopa County, Arizona, containing eighty (80) acres, more or less.

(3) That on March 4, 1920, David A. Jacobson executed and delivered to the Phoenix Savings Bank and Trust Company, a corporation, his certain real property mortgage upon Lots 38 and 39 of the Town of Chandler, Maricopa County, Arizona, which said mortgage was recorded March 6, 1920, in Book 125 of Mortgages at page 257, as security for the payment of $10,000.00, and thereafter the Phoenix Savings Bank and Trust Company, a corporation, on the 18th day of June, 1923, filed in the Superior Court of the State of Arizona, in and for the County of Maricopa, an action against David A. Jacobson and others to foreclose said mortgage, which action was numbered 17860–C among the files and records of the clerk of said court.

That on May 8, 1922, David A. Jacobson, bankrupt, executed and delivered to the Bank of Chandler, a corporation of Arizona, his real property mortgage upon Lots 38 and 39 of the Town of Chandler, Maricopa County, Arizona, which said mortgage was recorded on June 17, 1922, in Book 148 of Mortgages at page 434, as security for the payment of the sum of $16,955.00.

That thereafter David A. Jacobson assigned by an instrument in writing to one Harry J. Collis as security for an indebtedness of $3,000.00, a certain indenture of lease made and entered into January 25, 1922, between David A. Jacobson, first

party, and Chamber of Commerce of Chandler, Arizona, second party, in which said lease the Chamber of Commerce agreed to pay to David A. Jacobson a monthly rental of $35.00 for two years, commencing on February 1, 1922, and ending January 31, 1924, and another certain indenture of lease made and entered into on November 5, 1920, between David A. Jacobson, first party, and J. N. Armstrong and J. F. Sparks, second parties, in which said lease J. N. Armstrong and J. F. Sparks agreed to pay to David A. Jacobson a rental of $6,000.00, payable $100.00 per month beginning [15] November 15, 1920, and concluding November 14, 1925.

That said Lots 38 and 39 of the Town of Chandler, Maricopa County, Arizona, are also subject to unpaid taxes and street improvement bonds.

(4) That on December 30, 1919, David A. Jacobson executed and delivered to the Phoenix Savings Bank and Trust Company, a corporation, his certain real property mortgage upon Lot 25 of the Town of Chandler, Maricopa County, Arizona, which said mortgage was recorded March 6, 1920, in Book 123 of Mortgages at page 287, as security for the payment of $10,000.00, and thereafter the Phoenix Savings Bank and Trust Company, a corporation, on the 18th day of June, 1923, filed in the Superior Court of the State of Arizona, in and for the County of Maricopa, an action against David A. Jacobson and others to foreclose said mortgage, which action is numbered 17861–C among the files and records of the clerk of said court.

That on February 27, 1923, David A. Jacobson, Bankrupt, executed and delivered to the Bank of Chandler, a corporation of Arizona, his real property mortgage upon Lot 25 of the Town of Chandler, Maricopa County, Arizona, which said mortgage was recorded March 1, 1923, in Book 148 of Mortgages at page 434 as security for the payment of the sum of $16,955.00; said mortgage recites that it is subject to the first mortgage of the Phoenix Savings Bank and Trust Company, hereinbefore referred to, and also subject to a second mortgage on the same lot, executed by David A. Jacobson, Bankrupt, to one Katie Werner, as security for the sum of $2,000.00.

Petitioner is informed and believes that bankrupt was indebted to Katie Werner in the sum of $2,000.00, and that said indebtedness is secured by a second mortgage upon said Lot 25 of the Town of Chandler.

(5) That on January 7, 1920, David A. Jacobson executed and delivered to Dwight B. Heard Investment Company of Arizona, [16] his certain real property mortgage upon Lots 26, 27 and 28 of the Town of Chandler, Maricopa County, Arizona, which said mortgage was recorded January 9, 1920, in Book 123 of Mortgages, pages 355 and 356, as security for the payment of 10,000.00, and thereafter by an instrument in writing said Dwight B. Heard Investment Company, a corporation of Arizona, assigned said mortgage to the Northern Trust Company, a corporation. Said assignment was dated February 20, 1920, and was

recorded January 31, 1921, in Book —— of Assignments, page ——. That on August 3, 1923, the Northern Trust Company, a corporation, filed in the Superior Court of the State of Arizona, in and for the County of Maricopa, an action against David A. Jacobson and others to foreclose said mortgage, which action is numbered 18033–C among the files and records of the clerk of said court.

That on December 28, 1921, David A. Jacobson leased to the United States of America that certain room 18 feet 6 inches by 70 feet, inside measurement, on the first floor of the one story brick premises known as the Post Office Building, situate on the south side of Boston Street between Arizona Avenue and Oregon Street, on Lot 27 of Chandler, Maricopa County, Arizona, for the term of five years next ensuing after July 1, 1921, for the quarterly rental of $1.00 per quarter, payable on the 1st day of January, April, July and October of each year.

That on June 16, 1921, David A. Jacobson, Bankrupt, executed and delivered to Katie Werner, a widow, his real property mortgage upon Lots 26, 27 and 28 of the Town of Chandler, Arizona, as security for the payment of the sum of $2,000.00; said mortgage was recorded June 16, 1921, Book 139 of Mortgages, page 299.

That on May 8, 1922, David A. Jacobson, Bankrupt, executed and delivered to the Bank of Chandler, a corporation, his real property mortgage upon Lots 26, 27 and 28 of the town of Chandler, Maricopa County, Arizona, as security for the payment

of the sum of $16,955.00. Said mortgage was recorded June 17, 1922, in [17] Book 148 of Mortgages at page 434.

That said Lots 26, 27 and 28 of the Town of Chandler, Maricopa County, Arizona, are also subject to unpaid taxes and street improvement bonds.

(6) That on April 17, 1920, David A. Jacobson executed and delivered to Dwight B. Heard Investment Company, a corporation, his certain real property mortgage upon Lots 36 and 37 of the Town of Chandler, Maricopa County, Arizona, which said mortgage was recorded April 28, 1920, in Book 130 of Mortgages, pages 66–68, as security for the payment of $7,500.00, and thereafter by an instrument in writing said Dwight B. Heard Investment Company, a corporation, assigned said mortgage to the Northern Trust Company, a corporation. Said assignment was dated June 22, 1920, and was recorded October 18, 1920, in Book —— of Assignments at page —. That on August 3, 1923, the Northern Trust Company, a corporation, filed in the Superior Court of the State of Arizona, in and for the County of Maricopa, an action against David A. Jacobson and others to foreclose said mortgage, which action is numbered 18032–C among the files and records of the clerk of said court.

That on October 25, 1921, David A. Jacobson executed and delivered to H. L. Hancock his real property mortgage upon Lots 36 and 37 of the Town of Chandler, Maricopa County, Arizona, as security for the payment of the sum of $2,500.00; said mortgage was recorded October 25, 1921, in Book 137 of Mortgages at page 112.

That on May 8, 1922, David A. Jacobson executed and delivered to the Bank of Chandler, a corporation, his real property mortgage upon Lots 36 and 37 of the Town of Chandler, Maricopa County, Arizona, as security for the payment of the sum of $16,955.00. Said mortgage was recorded June 17, 1922, in Book 148 of Mortgages at page 434. [18]

That thereafter David A. Jacobson by an instrument in writing assigned to Ray Jacobson, a spinster, as security for $6,000.00, a lease entered into February 1, 1922, between David A. Jacobson as first party and one J. B. Weber as second party, wherein said Weber agreed to pay to David A. Jacobson rental of $3,060.00 at the rate of $85.00 per month on the 1st day of May, 1922, and concluding with April 1, 1925, and another lease dated November 1, 1919, between David A. Jacobson as first party and W. Menhennett as second party, in which said Menhennett agreed to pay said Jacobson as rental $12,000.00 in monthly installments.

(7) That on or about the 24th of October, 1917, David A. Jacobson executed and delivered to the Chandler Improvement Company his real property mortgage upon the following described premises situate in Maricopa County, Arizona, to wit:

The Southeast Quarter of the Southeast Quarter and the South Half of the Northeast Quarter of the Southeast Quarter, excepting 33 feet on the South and East lines for road purposes, of Section Ten, Township Two South, Range Five East, Gila and Salt River Base and meridian, Maricopa County, Arizona,

as security for the payment of two promissory notes of the same date, upon which there is now a balance due of $6825.00 principal, and interest in the sum of $1261.58. Said mortgage was recorded on the —— day of ————, 19——, in Book 108 of Mortgages at page 338 thereof.

That on or about February 28, 1918, Alex A. DeWitt and Jessie DeWitt executed and delivered to the Chandler Improvement Company their real property mortgage upon the following described premises situate in Maricopa County, Arizona, to wit:

> The North Half of the Northeast Quarter of the Southeast Quarter, excepting 33 feet on the North and East lines for road purposes, of Section Ten, Township Two South, Range Five East, Gila and Salt River Base and Meridian, Maricopa County, Arizona, [19]

as security for the payment of two promissory notes, upon which there is now due the principal sum of $2275.00, and interest in the sum of $438.38, said mortgage being recorded in Book 109 of Mortgages at page 584 thereof.

That on or about November 4th, 1918, Alex A. DeWitt and Jessie DeWitt transferred title of the last described property to David A. Jacobson, bankrupt herein.

That on or about the 26th day of May, 1921, David A. Jacobson executed a second mortgage upon the real property described as

> The East Half of the Southeast Quarter of Section Ten, Township Two South, Range Five

East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, containing 80 acres, more or less,

and delivered the same to Reuben Jacobson as security for the principal sum of $2,000.00, which said mortgage was recorded on the 26th day of May, 1921, in Book 140 of Mortgages, at pages 241–2.

That on May 8th, 1922, David A. Jacobson executed and delivered to the Bank of Chandler, a corporation, his real property mortgage upon

The East Half of the Southeast Quarter of Section Ten, Township Two South, Range Five East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, containing 80 acres, more or less,

which said mortgage was recorded June 17, 1922, in Book 148 of Mortgages at page 434 thereof, as security for the payment of the sum of $16,955.

(8) That the J. D. Halstead Lumber Company, a corporation, did heretofore, and on or about the 22d day of June, 1923, obtain a judgment in the Superior Court of the State of Arizona, in and for the County of Maricopa, in the sum of $1974.35, $200 attorney fees and $10.10 costs, all with [20] interest, which judgment remains unsatisfied and constitutes a lien against all of the real property in this petition described and referred to, and other real property. That said Trustee is informed and believes that the lien of the said J. D. Halstead Lumber Company was obtained within four months of the bankruptcy of David A. Jacobson, and is void

or voidable as a preference under the Bankruptcy Act.

(9) That one Reuben Jacobson, through his attorneys, Zimmerman & Mulhern, has in writing made a bid for the purchase of the East Half of the Southeast Quarter of Section Ten, Township Two South, Range Five East, of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona, containing 80 acres, more or less, and has agreed to pay therefor the sum of $15,500, but that said bid has not as yet been signed by Reuben Jacobson, and no deposit on account thereof in cash has been made, but said Trustee has caused a bid in the usual form required by him to be prepared and submitted to said Zimmerman & Mulhern for execution, which will require a deposit of ten per cent of the amount of the bid. Your petitioner believes said bid will be properly executed and the required deposit made within ten days from date hereof.

(10) That your Trustee believes the value of the East Half of the Southeast Quarter of Section Ten, Township Two South, Range Five East, of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona, containing 80 acres, more or less, to be of the value of not less than $15,500, which said sum is in excess, as your Trustee is informed and believes, of the first and second mortgages against said property. That your Trustee cannot ascertain the amount of further encumbrances against said property for the reason that all further encumbrances on said property are likewise encum-

brances upon [21] other properties herein described and property not herein described.

(11) That a stipulation has been in writing entered into between: The Phoenix Savings Bank & Trust Company, a Corporation; The Northern Trust Company, a Corporation; Katie Werner and Homer F. Allen, Trustee in Bankruptcy of David A. Jacobson, which said stipulation is on file herein, and by the terms thereof, the parties thereto have stipulated and agreed that Lots 25, 26, 27, 28, 36, 37, 38 and 39 of the Town of Chandler, Maricopa County, Arizona, may be sold by the Trustee in Bankruptcy, free and clear of the encumbrances of such parties, their lien to be transferred to the proceeds upon the sale. Said stipulation further provides the time within which such sale shall be made, and fixes the expense in connection therewith. Reference is made to said stipulation on file for all of its terms and conditions. Said stipulation has at a meeting of the creditors been approved by the Referee in Bankruptcy herein.

(12) Said Trustee is informed, and upon such information alleges that there is a clear equity in said real property in this petition described, over and above all the encumbrances against said property, and that it is for the best interests of said bankrupt estate and the creditors thereof, secured and unsecured, and all of the persons claiming liens upon said property, that the said property be sold by the Trustee in Bankruptcy, free and clear of all encumbrances, and that all liens against the prop-

erty be transferred to the proceeds derived from the sale thereof.

(13) That there is pending herein a petition by The Chandler Improvement Company, a Corporation, for leave to foreclose its mortgages upon the East Half of the Southeast [22] Quarter of Section Ten, Township Two South, Range Five East, of the Gila and Salt River Base and Meridian in Maricopa County, Arizona.

WHEREFORE, said Trustee prays for an order to show cause upon:

The Phoenix Savings Bank and Trust Company, a Corporation;
The Northern Trust Company, a Corporation;
Katie Werner;
The Bank of Chandler, a Corporation;
The Chandler Improvement Company, a Corporation;
Reuben Jacobson;
The J. D. Halstead Lumber Company, a Corporation;
Ray Jacobson;
H. L. Hancock, and
Harry J. Collis,

why an order should not be entered authorizing and directing Homer F. Allen, Trustee in Bankruptcy of David A. Jacobson, to sell Lots 25, 26, 27, 28, 36, 37, 38 and 39, of the Town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances, the liens now existing upon said property to be transferred to the proceeds derived from the sale thereof in accordance with the stipu-

lation filed herein by certain of said lienors, and why an order should not be entered authorizing and directing Homer F. Allen, as Trustee in Bankruptcy of David A. Jacobson, to sell the East Half of the Southeast Quarter of Section Ten, Township Two South, Range Five East, Gila and Salt River Base and Meridian, in Maricopa County, Arizona, containing 80 acres, more or less, free and clear of liens and encumbrances, conditioned upon the purchase price at a Trustee's Sale of said property and of Lots 25, 26, 27, 28, 36, 37, 38 and 39, being sufficient to pay all of the liens against all of said property, and for an order directing all of the respondents herein to file their claims against David A. Jacobson in this bankruptcy proceeding with a statement of the security held by each within [23] thirty days from the date hereof, and for an order after notice to creditors for sale of the real property herein described free of encumbrance.

(Signed) HOMER F. ALLEN,
Petitioner.

(Signed) HENDERSON STOCKTON,
Attorney for Petitioner.

United States of America,
Federal District of Arizona,—ss.
State of Arizona,
County of Maricopa,—ss.

Homer F. Allen, being upon his oath first duly sworn, deposes and says: That he is the petitioner in the foregoing petition that he has read the same

and knows the contents thereof, and believes the statements therein made to be true.

(Signed) HOMER F. ALLEN.

Subscribed and sworn to before me this 20th day of November, A. D. 1923.

[Seal] (Signed) JAMES H. WARD,
Notary Public.

My commission expires 6/13/1927.

(Endorsed on back): In the District Court of the United States for the Federal District of Arizona. In Bankruptcy—No. B-279 (Phoenix). In the Matter of David A. Jacobson, Bankrupt. [24] Petition for Order to Show Cause Why Real Property Should not be Sold Free and Clear of Liens, and Petition for Sale of Real Property Free and Clear of Liens. Filed Nov. 21, 1923, at 9:30 A. M. (Signed) R. W. Smith, Referee. Henderson Stockton, Phoenix, Arizona. (Pencil) 17.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of petition for order to show cause why real property should not be sold free and clear of liens, and petition for sale of real property free and clear of liens as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [25]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-279 (PHOENIX).

In the Matter of DAVID A. JACOBSON, Bankrupt.

ORDER TO SHOW CAUSE.

Homer F. Allen, having filed herein his petition, duly verified for an order upon the Phoenix Savings Bank & Trust Company, a corporation; The Northern Trust Company, a corporation; Katie Werner; The Bank of Chandler, a corporation; The Chandler Improvement Company, a corporation; Reuben Jacobson; The J. D. Halstead Lumber Company, a corporation; Ray Jacobson; H. L. Hancock, and Harry J. Collis, why Lots 25, 26, 27, 28, 36, 37, 38 and 39 of the Town of Chandler, Maricopa County, Arizona, should not be sold free and clear of all liens and encumbrances, and why the East Half of the Southeast Quarter of Section 10, Township 2, South Range 5 East, G. & S. R. B. & M., in Maricopa County, Arizona, containing 80 acres more or less, should not be sold free and clear of liens and

encumbrances, conditioned upon the purchase price at trustee's sale of said property and the purchase price of Lots 25, 26, 27, 28, 36, 37, 38 and 39 aforesaid being sufficient to pay all of the liens against all of said property and for an order directing all of said persons to file their claims against David A. Jacobson, in bankruptcy, with a statement of the security held by each within thirty days from the date hereof, good cause appearing therefor, and on motion of Henderson [26] Stockton, counsel for said trustee,

IT IS ORDERED that the Phoenix Savings Bank & Trust Company, a corporation, The Northern Trust Company, a corporation, Katie Werner; The Bank of Chandler, a corporation, The Chandler Improvement Company, a corporation, Reuben Jacobson, The J. D. Halstead Lumber Company, a corporation, Ray Jacobson, H. L. Hancock and Harry J. Collis, be and appear before the undersigned referee in bankruptcy on the 3d day of December, 1923, at 10 A. M., then and there to show cause, if any they may have, why the prayer of the petition hereinbefore referred to should not be granted, and why an order should not be made and entered authorizing and directing Homer F. Allen, trustee in bankruptcy of David A. Jacobson, to sell Lots 25, 26, 27, 28, 36, 37, 38 and 39 of the Town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances, the liens now existing upon said property to be transferred to the proceeds derived from a sale thereof; and further why an order should not be made and entered au-

thorizing and directing said Homer F. Allen, as trustee in bankruptcy of David A. Jacobson, to sell the East Half of the Southeast Quarter of Section 10, Township 2 South, Range 5 East, G. & S. R. B. & M., in Maricopa County, Arizona, containing 80 acres, more or less, free and clear of liens and encumbrances, conditioned upon the purchase price at trustee's sale of said property and of Lots 25, 26, 27, 28, 36, 37, 38 and 39, being sufficient to pay all of the liens against all of said property; and further why an order should not be entered directing each of the parties aforesaid to file their claims in bankruptcy herein with the statement of the security held therefor on or before 30 days from and after the date hereof; and further why said sale of said property, free and clear of liens and encumbrances, should not be made on or before ninety days from and after the 10th day of November, 1923. [27]

IT IS FURTHER ORDERED that service of this order to show cause be made upon the respondents herein named by depositing a copy of this order, together with a copy of said petition in an envelope addressed to each respondent at his address as given in the schedules in bankruptcy, or to his last known address, in the United States mail at Phoenix, Arizona, duly registered, postage and registry fee prepaid, or by the delivery of a copy hereof, together with a copy of said petition to each of the parties named herein.

Dated, Phoenix, Arizona, November 21, 1923.

(Signed) R. W. SMITH,
Referee in Bankruptcy.

(Endorsed on back): In the District Court of the United States for the Federal District of Arizona. In Bankruptcy—No. B–279 (Phoenix). In the Matter of David A. Jacobson, Bankrupt. Order to Show Cause. (Ink) Rec'd copy for Katie Werner, Reuben Jacobson, Ray Jacobson, Harry J. Collis this 21st of November, 1923. (Stamp) Zimmerman & Mulhern. (Ink) By F. L. Z. (Ink) Filed Nov. 24, 1923, at 4 P. M. (Signed) R. W. Smith, Referee. [28] Henderson Stockton, Phoenix, Arizona. (Pencil) 19.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of affidavit of service and order to show cause as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [29]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. 282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

ORDER DIRECTING SALE OF REAL PROPERTY FREE AND CLEAR OF LIENS.

The trustee herein, Homer F. Allen, having filed his verified petition for an order upon the Phoenix Savings Bank and Trust Company, a corporation, the Northern Trust Company, a corporation, Katie Werner, the Bank of Chandler, a corporation, the Chandler Improvement Company, a corporation, Reuben Jacobson, the J. D. Halstead Lumber Company, a corporation, Ray Jacobson, H. L. Hancock, and Harry J. Collis to show cause why real property belonging to said estate, described in said petition and hereinafter particularly described, should not be sold free and clear of all liens and encumbrances at public auction and in the manner prescribed by the Acts of Congress relating to bankruptcy and the general orders of the Supreme Court of the United States, and why the liens and encumbrances should not be transferred to the proceeds derived from such sale to all intents and purposes as though the said property had not been sold, and an order to show cause upon said parties having been issued and returnable before R. W. Smith, Esq., Referee in Bankruptcy, on the 3d day

of December, 1923, at ten A. M., as prayed in said petition and particularly as appears of record herein, and the trustee having also petitioned for an order, after notice to creditors as required by law, to sell real property in said petition and hereinafter specifically [30] described, free and clear of liens and encumbrances, all liens and encumbrances upon said property to be transferred to the proceeds derived from the sale thereof, to all intents and purposes as though the property had not been sold, and ten days' notice to creditors having been given, as required by law, of a hearing on said petition last referred to, and it appearing to the Court that the order to show cause aforesaid has been served upon all of the parties named therein as required by law and the order aforesaid, said order to show cause and the said petition for sale of said property as aforesaid came on regularly for hearing on the 3d day of December, 1923, at ten o'clock in the forenoon of said day, at which time there appeared the trustee in person and by his counsel, Henderson Stockton, Esq., the bankrupt by his counsel, Zimmerman and Mulhern, certain creditors as appears of record by their respective counsel, to wit, Messrs. Schupp and Hill, Arthur E. Price, Esq., and Henderson Stockton, Esq.; the Phoenix Savings Bank & Trust Company, a corporation, the Northern Trust Company, a corporation, the Bank of Chandler, a corporation, and the Chandler Improvement Company, a corporation, appeared in response to said order to show cause by their counsel, Arthur E. Price; Ray Jacobson,

Katie Werner, Reuben Jacobson and Harry J. Collis appeared in response to said order to show cause by their attorneys, Messrs. Zimmerman and Mulhern; and respondent J. D. Halstead Lumber Company, a corporation, failed to appear in person or by counsel; and the respondent H. L. Hancock appeared in person and by his counsel, Messrs. Kibbey, Bennett, Gust and Smith; and neither of said respondents except H. L. Hancock filed any written objections or response to the said order to show cause, or presented any opposition to the order as prayed by the trustee in the petition aforesaid except [31] said H. L. Hancock, and the said H. L. Hancock filed objections to a sale of only Lots 36 and 37 in Chandler Townsite, Maricopa County, Arizona.

Whereupon, said petition was heard and examined as it respects the real property described in said order to show cause and in said petition, and it appearing that various of the parties to said order to show cause had in person or by their counsel stipulated for the sale of the real property hereinafter described, free and clear of encumbrances, all liens and encumbrances to be transferred to the proceeds derived therefrom, conditioned that said sale be made on or before ninety days from and after the date of said stipulation, to wit, the 10th day of November, 1923, and it further appearing that the parties to said stipulation extended the time mentioned therein for procuring the assent of other interested parties thereto or an order of this court for the sale of said property set forth in said stipu-

lation to the 5th day of December, 1923, and it having been made to appear to the satisfaction of this court that it is for the best interests of the creditors of said estate that the real property hereinafter described be sold free and clear of all liens and encumbrances, any and all liens to be transferred to the proceeds derived from the sale, and that said sale be made on or before ninety days from and after the 10th day of November, 1923, and for divers other reasons that the said application is proper and should be granted;

Upon motion of Henderson Stockton, Esq., attorney for said trustee, no objections being manifested and no adverse interests appearing or being represented thereat, [32] it is ordered that Homer F. Allen, Esq., as trustee of David A. Jacobson, bankrupt, be and he is hereby authorized, directed and permitted to sell and dispose of, at public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, within ninety days from and after the 10th day of November, 1923, all of the real property hereinafter specifically described, free and clear of and from all liens and encumbrances described in said petition and in said order to show cause and as appears of record against said property, save and except only valid and subsisting leases on the real property hereinafter described, but free from the claims of any of the assignees of such leases, and that all liens and encumbrances against said real property be transferred to the

proceeds derived from said sale, and that said proceeds of and from the sale of the said real property be held by said trustee subject to all of the liens and encumbrances against said property, to all intents and purposes as though the said property had not been sold, except the expenses of administration, fees and commissions set forth in said stipulation hereinbefore referred to.

It is further ordered that said stipulation referred to herein be and the same is hereby approved, and it is ordered that the proceeds derived from the sale of the property hereinafter specifically described be applied in payment of the liens and encumbrances as set forth in said stipulation aforesaid; that the liens and encumbrances upon said property are as set forth in said stipulation and are in the order of priority as set forth in said stipulation.

It is further ordered that any of the parties holding liens or encumbrances upon the property hereinafter [33] specifically described may be a bidder at the trustee's sale and the amount due any such person in the order thereof as set forth in said stipulation, and hereby fixed in accordance therewith, may be applied on the payment of the purchase price if said party is the successful bidder at said trustee's sale, except that in all events there shall be paid in cash a sum equal to the expenses of administration in bankruptcy upon the property for which such bid is made and accepted, including among other items the expenses of sale, Referee's commissions, trustee's fees and commissions, and

attorney's fees of attorney for trustee in the amount of five per cent of the purchase price, as fixed by said stipulation aforesaid, which said sum is hereby fixed and established as reasonable compensation to the attorney for said trustee for the services he has rendered.

The real property aforesaid is described as follows, to wit, Lots 25, 26, 27, 28, 38 and 39 of the Town of Chandler, Maricopa County, Arizona, according to the map of said townsite recorded in Book 5 of Maps at page 34 thereof.

A separate order is being entered herewith respecting Lots 36 and 37 of the Town of Chandler, Maricopa County, Arizona.

That the hearing on said petition for sale of real property free and clear of encumbrances as the same applies to the east half of the southeast quarter of Section 10, Township 2 South, Range 5 East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona, containing eighty acres, more or less, be and the same is hereby continued to the 8th day of December, 1923, at ten o'clock in the forenoon of said day.

It is further ordered that the Phoenix Savings Bank & Trust Company, a corporation, the Northern Trust Company, [34] a corporation, Katie Werner, the Bank of Chandler, a corporation, the Chandler Improvement Company, a corporation, Reuben Jacobson, the J. D. Halstead Lumber Company, a corporation, Ray Jacobson and Harry J. Collis each file separately his, her or its claim against David A. Jacobson in this bankruptcy pro-

ceeding, with a statement of the security held by him, her or it, within thirty days from the date of the service of a copy hereof upon him, her or it.

Dated December 3, 1923.

(Signed) R. W. SMITH,
Referee in Bankruptcy.

(Endorsed on back): In the District Court of the United States for the Federal District of Arizona. In Bankruptcy—No. 282–Phoenix. In the Matter of David Jacobson, Bankrupt. Henderson Stockton, Attorney for Trustee. (Ink) Filed Dec. 18, 1923, at 1:30 P. M. R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of order directing sale of real property free and clear of liens, in [35] the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 16th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By M. R. Malcolm,
Deputy Clerk. [36]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

RETURN OF SALE OF REAL PROPERTY.

The Trustee herein, Homer F. Allen, respectfully represents and shows:

That under and pursuant to an order of this Court heretofore duly given, made and entered he has sold to the Phoenix Savings Bank & Trust Company, a corporation, for the sum of fifteen thousand five hundred twenty-seven and 64/100 dollars ($15,527.64), free and clear of liens and encumbrances, the following described real property situate in the town of Chandler, in Maricopa County, Arizona, to wit:

> Lot twenty-five (25) of the town of Chandler, in Maricopa County, Arizona, together with the improvements thereon.

That before making said sale your Trustee advertised said real property for sale in each issue of both the "Arizona Republican" and the "Chandler Arizonian," beginning on the 10th day of January, 1924, and ending on the 7th day of February, 1924. Said advertisement in said papers was in the words and figures following, to wit:

"Trustee's Sale.

On Thursday, February 7th, 1924, I will sell to

the highest bidder for cash the following described real property belonging to the estate of David A. Jacobson, bankrupt.

Lot 25, Town of Chandler,

Lots 26, 27 and 28, Town of Chandler,

Lots 36 and 37, Town of Chandler,

Lots 38 and 39, Town of Chandler.

Said sale to be held in my office, rooms 411, 412, National Bank of Arizona Building, Phoenix, [37] Arizona. A deposit of ten per cent of amount must accompany each bid. Sale to be made subject to confirmation by the Bankruptcy Court and the right is reserved to reject any and all bids.

HOMER F. ALLEN,

Trustee in Bankruptcy for David A. Jacobson, Bankrupt."

That on the 7th day of February, 1924, pursuant to the notice contained in said advertisement, your Trustee offered for sale at his offices, rooms 411, 412, National Bank of Arizona Building, the aforedescribed real property, and did not receive at said offices of your petitioner any bid, but a bidder appeared there who desired to present his bid for said property to your Trustee in the office of the Referee in charge of the bankruptcy of David A. Jacobson. Whereupon on said 7th day of February, 1924, at ten o'clock in the forenoon of said day, at the office of R. W. Smith, Esquire, Referee in Bankruptcy, in charge of the bankruptcy of said David A. Jacobson, at room 208 Heard Building, Phoenix, Arizona, a bid in the sum of $15,527.64 was presented to your Trus-

tee by the Phoenix Savings Bank & Trust Company, a corporation, and was by your Trustee then accepted, subject to confirmation of the Court.

At the aforesaid Referee's office, at the date and hour aforesaid, there were present the Trustee, Homer F. Allen; Messrs. Zimmerman & Mulhern, attorneys representing the bankrupt, Katie Werner and certain other interested parties; Harry L. Hancock was present in person and was represented by his counsel, Kibbey, Bennett, Gust & Smith, and C. A. Baldwin, of Chandler, Arizona, was present in person representing himself, and Arthur E. Price, Esquire, was present, representing the Northern Trust Company, a corporation, and certain other interested parties.

That no other bids were received by your Trustee for [38] the aforedescribed real property. That since the election of your Trustee he has endeavored to sell said real property. That the bid made by the Phoenix Savings Bank & Trust Company is the only bid that he has received for said property, not withstanding many persons have investigated the same. That the bid of the Phoenix Savings Bank & Trust Company, a corporation, was the highest and best bid received for said property and constitutes the fair value thereof.

WHEREFORE, said Trustee prays for an order approving and confirming said sale of said property to said Bidder, and that the Trustee be authorized and directed to make, execute and deliver to the said purchaser a trustee's deed to said

real property upon receipt of the said purchase price.

(Signed) HOMER F. ALLEN,
Trustee.

(Signed) HENDERSON STOCKTON,
Attorney for Trustee.

United States of America,
Federal District of Arizona,
State of Arizona,
County of Maricopa,—ss.

Homer F. Allen, being upon his oath first duly sworn, deposes and says: That he is the Trustee of David A. Jacobson, bankrupt; that he has read the foregoing return of sale of real property; that he believes the statements in said return contained to be true.

(Signed) HOMER F. ALLEN.

Subscribed and sworn to before me this 3d day of ~~February~~, 1924.
March

[Seal] (Signed) HELEN ERICKSON,
Notary Public.

My commission expires Nov. 24, 1927. [39]

(Endorsed on back): Filed Mch. 3, 1924, at 11:55 A. M. R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of return of sale of real

property, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [40]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

RETURN OF SALE OF REAL PROPERTY.

The Trustee herein, Homer F. Allen, respectfully represents and shows:

That under and pursuant to an order of this Court heretofore duly given, made and entered he has sold to the Northern Trust Company, a corporation, for the sum of fifteen thousand five hundred forty-seven and 70/100 dollars ($15,547.70), free and clear of liens and encumbrances, the following described real property situate in the town of Chandler, in Maricopa County, Arizona, to wit:

> Lots twenty-six (26), twenty-seven (27) and twenty-eight (28) in the town of Chandler,

Maricopa County, Arizona, together with the improvements thereon.

That before making said sale your Trustee advertised said real property for sale in each issue of both the "Arizona Republican" and the "Chandler Arizonian," beginning on the 10th day of January, 1924, and ending on the 7th day of February, 1924. Said advertisement in said papers was in the words and figures following, to wit:

"Trustee's Sale.

On Thursday, February 7th, 1924, I will sell to the highest bidder for cash the following described real property belonging to the estate of David A. Jacobson, bankrupt.

Lot 25, Town of Chandler,
Lots 26, 27 and 28, Town of Chandler,
Lots 36 and 37, Town of Chandler,
Lots 38 and 39, Town of Chandler. [41]

Said sale to be held in my office, rooms 411, 412, National Bank of Arizona Building, Phoenix, Arizona. A deposit of ten per cent of amount must accompany each bid. Sale to be made subject to confirmation by the Bankruptcy Court and the right is reserved to reject any and all bids.

HOMER F. ALLEN,
Trustee in Bankruptcy for David A. Jacobson, Bankrupt."

That on the 7th day of February, 1924, pursuant to the notice contained in said advertisement, your Trustee offered for sale at his offices, rooms 411, 412, National Bank of Arizona Building, the aforedescribed real property, and did not receive

at said offices of your petitioner any bid, but a bidder appeared there who desired to present his bid for said property to your Trustee in the office of the Referee in charge of the bankruptcy of David A. Jacobson. Whereupon on said 7th day of February, 1924, at ten o'clock in the forenoon of said day, at the office of R. W. Smith, Esquire, Referee in Bankruptcy, in charge of the bankruptcy of said David A. Jacobson, at room 208 Heard Building, Phoenix, Arizona, a bid in the sum of $15,547.70 was presented to your Trustee by the Northern Trust Company, a corporation, and was by your Trustee then accepted, subject to confirmation of the Court.

At the aforesaid Referee's office, at the date and hour aforesaid, there were present the Trustee, Homer F. Allen; Messrs. Zimmerman & Mulhern, attorneys representing the bankrupt, and Katier Werner, and certain other interested parties; Arthur E. Price, Esquire, was present representing the Northern Trust Company, a corporation, and certain other interested parties; Harry L. Hancock was present in person and was represented by his counsel, Kibbey, Bennett, Gust & Smith, and C. A. Baldwin, of Chandler, Arizona, was present in person, representing himself.

That no other bids were received by your Trustee for the aforedescribed real property. That since the election of your [42] Trustee he has endeavored to sell said real property. That the bid made by the Northern Trust Company is the only bid that he has received for said property,

notwithstanding many persons have investigated the same. That the bid of the Northern Trust Company, a corporation, was the highest and best bid received for said property and constitutes the fair value thereof.

WHEREFORE, said Trustee prays for an order approving and confirming said sale of said property to said Bidder, and that the Trustee be authorized and directed to make, execute and deliver to the said purchaser a trustee's deed to said real property upon receipt of the said purchase price.

(Signed) HOMER F. ALLEN,
Trustee.

(Signed) HENDERSON STOCKTON,
Attorney for Trustee.

United States of America,
Federal District of Arizona,
State of Arizona,
County of Maricopa,—ss.

Homer F. Allen, being upon his oath first duly sworn, deposes and says: That he is the Trustee of David A. Jacobson, bankrupt; that he has read the foregoing return of sale of real property; that he believes the statements in said return contained to be true.

(Signed) HOMER F. ALLEN.

Subscribed and sworn to before me this 3d day of March, 1924.

[Seal] (Signed) HELEN ERICKSON,
Notary Public.

My commission expires Nov. 24, 1927. [43]

(Endorsed on back): (Ink) Filed Mch. 3, 1924, at 11:54 A. M. (Signed) R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of return of sale of real property, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [44]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

ORDER CONFIRMING SALE OF REAL PROPERTY.

The Trustee, Homer F. Allen, having filed therein his return of sale, from which return of sale it appears that under and pursuant to an order of this Court heretofore duly given, made and en-

tered he has sold lot 25 of the town of Chandler, Maricopa County, Arizona, free and clear of encumbrances, to the Phoenix Savings Bank & Trust Company, a corporation, for the sum of fifteen thousand five hundred twenty-seven and 64/100 dollars ($15,527.64).

AND IT FURTHER APPEARING TO THE COURT that the amount of the bid of said Phoenix Savings Bank & Trust Company represents the fair value of said property, and that it is for the best interests of said estate in bankruptcy that said sale be approved and confirmed.

NOW, THEREFORE, on motion of Henderson Stockton, attorney for said Trustee,

IT IS ORDERED, that the sale by said Trustee, Homer F. Allen to the Phoenix Savings Bank & Trust Company, a corporation, of lot 25 of the town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances be and the same is hereby approved and confirmed.

Said Trustee is ordered and directed to make, execute and deliver to the said Phoenix Savings Bank & Trust Company, a corporation, a trustee's deed to said property upon receipt of the purchase price. [45]

Said Trustee is further ordered and directed to pay out of the purchase price to the Phoenix Savings Bank & Trust Company, a corporation, the sum of $14,103.97, which sum is the amount of the lien of the Phoenix Savings Bank & Trust Company, a corporation, upon said property, heretofore fixed and agreed upon by stipulation and order

of this Court dated the 3d day of December, 1923, and order of this Court of even date herewith, and hereby approved and allowed.

Said Trustee is further ordered and directed to pay out of the purchase price to Henderson Stockton the sum of $776.28 as attorney's fees, being five per cent of $15,527.64, the purchase price of said property, which sum was heretofore by stipulation of the interested parties agreed upon and by order of December 3, 1923, approved and allowed, and which sum is hereby approved and allowed as his fee for services rendered in connection with said sale.

Said Trustee is further ordered and directed to pay out of the purchase price to Homer F. Allen, Trustee, the sum of $192.16, being the *pro rata* amount of Trustee's fee upon the entire estate amounting to $58,515.09; the aggregate amount of trustee's fee is $725.15 and calculated on the basis of 26.5% of the total trustee's fee on said sum.

Said Trustee is further ordered to pay to Homer F. Allen the sum of $80.37, reimbursement of expenses of sale of said property on a basis of total expense $303.27 prorated and being 26.5 per cent of total.

Said Trustee is further ordered and directed to pay out of the purchase price to R. W. Smith, Esquire, Referee in Bankruptcy, the sum of
$141.04,
~~$155.28,~~ being referee's commission of one per cent
14,103.97,
on ~~$15,527.64,~~ the sale price of said property.

IT IS ORDERED that the fees of the Trustee

and expenses [46] of the Trustee and commissions of the Referee and the amounts hereinbefore stated be and they are hereby fixed, established, allowed and ordered paid in accordance with the stipulation of the parties and the order of the Referee dated the 3d day of December, 1923, and as herein provided.

Any review of this order shall be taken within ten days from and after the date hereof.

Dated at Phoenix, Arizona, March 3d, 1924.

(Signed) R. W. SMITH,
Referee.

(Endorsed on back): Filed Mch. 3, 1924, at 11:57 A. M. R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of order confirming sale of real property, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [47]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

ORDER CONFIRMING SALE OF REAL PROPERTY.

The Trustee, Homer F. Allen, having filed herein his return of sale, from which return of sale it appears that under and pursuant to an order of this Court heretofore duly given, made and entered, he has sold Lots 26, 27 and 28, of the town of Chandler, Maricopa County, Arizona, free and clear of encumbrances, to the Northern Trust Company, a corporation, for the sum of fifteen thousand five hundred forty-seven and 70/100 dollars ($15,547.70).

AND IT FURTHER APPEARING TO THE COURT that the amount of the bid of said Northern Trust Company represents the fair value of said property, and that it is for the best interests of said estate in bankruptcy that said sale be approved and confirmed;

NOW, THEREFORE, on motion of Henderson Stockton, attorney for said Trustee,

IT IS ORDERED, that the sale by said Trustee, Homer F. Allen, to the Northern Trust Company, a corporation, of Lots 26, 27 and 28 of the town of Chandler, Maricopa County, Arizona, free

and clear of all liens and encumbrances be, and the same is hereby approved and confirmed.

Said Trustee is ordered and directed to make, execute and deliver to the said Northern Trust Company, a corporation, a trustee's deed to said property upon receipt of the purchase price.

Said Trustee is further ordered and directed to pay out of the purchase price to the Northern Trust Company, a corporation, [48] the sum of $14,322.50, which sum if the amount of the lien of the Northern Trust Company, a corporation, upon said property, heretofore fixed and agreed upon by stipulation and order of this Court dated the 3d day of December, 1923, and order of this Court of even date herewith, and hereby approved and allowed.

Said Trustee is further ordered and directed to pay out of the purchase price to Henderson Stockton the sum of $777.39, as attorney's fees, being five per cent of $15,547.70, the purchase price of said property, which sum was heretofore by stipulation of the interested parties agreed upon and by order of December 3, 1923, approved and allowed, and which sum is hereby approved and allowed as his fee for services rendered in connection with said sale.

Said Trustee is further ordered and directed to pay out of the purchase price to Homer F. Allen, Trustee, the sum of $192.16, being the *pro rata* amount of Trustee's fee upon the entire estate amounting to $58,515.09; the aggregate amount of

Trustee's fee is $725.15 and calculated on the basis of 26.5% of the total Trustee's fee on said sum.

Said Trustee is further ordered to pay to Homer F. Allen the sum of $80.37, reimbursement of expenses of sale of said property on basis of total expense $303.27 prorated and being 26.5% of total.

Said Trustee is further ordered and directed to pay out of the purchase price to R. W. Smith, Esquire, Referee in Bankruptcy, the sum of $143.23, being Referee's commission of one per cent on $14,322.50, the sale price of said property.

IT IS ORDERED that the fees of the Trustee and expenses of the Referee and the amounts hereinbefore stated be and they are hereby fixed, established, allowed and ordered paid in [49] accordance with the stipulation of the parties and the order of the Referee dated the 3d day of December, 1923, and as herein provided.

Any review of this order shall be taken within ten days from and after the date hereof.

Dated at Phoenix, Arizona, March 3d, 1924.

(Signed) R. W. SMITH,
Referee.

(Endorsed on back): (Ink) Filed Mch. 3, 1924, at 11:56 A. M. (Signed) R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of order confirming sale of

real property, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [50]

In the District Court of the United States, for the Federal District of Arizona.

IN BANKRUPTCY—B-282.

In the Matter of DAVID A. JACOBSON, Bankrupt.

PETITION OF KATIE WERNER FOR ORDER SETTING ASIDE ORDER OF SALE, SALE OF REAL PROPERTY, AND ORDER CONFIRMING SALE OF REAL PROPERTY.

To the Honorable R. W. SMITH, One of the Referees in Bankruptcy in the District Court of the United States for the Federal District of Arizona, at Phoenix.

The petition of Katie Werner, a creditor of David A. Jacobson, bankrupt, respectfully represents:

(1) That she is a creditor of the above-named bankrupt, said bankrupt's indebtedness to her being evidenced by two certain promissory notes in the principal sums of $2,000 each, secured by second realty mortgages upon Lot 25 and Lots 26, 27 and

28, respectively, of the town of Chandler, Maricopa County, Arizona, according to the map or plat thereof on file and of record in the office of the County Recorder of said Maricopa County, Arizona, title to said lots 25, 26, 27 and 28 being vested in said David A. Jacobson on the date of his bankruptcy herein.

(2) That her proof (ink) of her said secured debt has been duly filed herein, to which proof of debt is hereby made reference.

(3) That said lot 25 was duly appraised by appraisers duly appointed by this Court at the sum of $18,000, and said lots 26, 27, and 28, were so appraised at the sum of $20,000. That at the time of bankruptcy and at all times prior to the sale hereinafter mentioned said lot 25 was incumbered by mortgage liens in an amount of [51] more than $16,000 and at said times lots 26, 27 and 28 were incumbered by mortgage liens in an amount in excess of $16,000.

(4) That on the 23d of October, 1923, Homer F. Allen, Trustee of the estate of said David A. Jacobson, bankrupt, filed herein his report and petition for an order to sell said lots 25, 26, 27, and 28, town of Chandler, together with other real property of said bankrupt, subject to all existing liens and encumbrances and on the matter thereafter coming on for hearing on said petition before R. W. Smith, Referee in Bankruptcy, said Referee did, on the 10th of November, 1923, make and enter an order authorizing said Trustee to sell at public sale, sub-

ject to all existing liens and incumbrances, said Lots 25, 26, 27 and 28, and said other real property.

(5) That on or about the 8th of November, 1923, Zimmerman & Mulhern, a firm of attorneys representing your petitioner herein, without her actual knowledge, and at the request of A. Henderson Stockton, attorney for said Trustee, signed a stipulation theretofore prepared by said A. Henderson Stockton, wherein it was provided that said Lots 25, 26, 27 and 28, and other real property of the bankrupt should be sold by said Homer F. Allen, Trustee, on any date not later than 90 days from the date of said stipulation, free and clear of all liens against said property, except leases on the same that were at the date of said stipulation valid but free from the claims of any assignees of any of such leases. That at the same time and place, Arthur E. Price, attorney for the first mortgage lienholders, and said A. Henderson Stockton, attorney for said Trustee, signed said stipulation. That said stipulation expressly provided that

> "15. It is further stipulated and agreed that all persons who have or assert liens upon the real property herein described shall be bound by the terms hereof upon assenting hereto in writing by the signing of this stipulation, . . ."

it being intended and contemplated, to the full knowledge of said firm of Zimmerman & Mulhern, said Arthur E. Price, and said A. Henderson Stockton, that said stipulation was to be presented to all [52] parties having liens on said real property for

their personal assent in writing and signature and that said stipulation should be personally assented to and signed by the particular lienor before becoming effective as to him or her. That your petitioner never signed said stipulation or in any way assented thereto. That on the day following the signature of said stipulation by said attorneys said R. W. Smith, Referee, was notified that your petitioner would not assent to or sign said stipulation. That said stipulation is on file with said Referee and reference thereto is hereby made.

(6) That on November 20, 1923, said Trustee filed herein his verified petition praying for an order to show cause upon your petitioner and other lienholders why an order should not be entered authorizing and directing him as Trustee to sell said Lots 25, 26, 27 and 28, town of Chandler, and other real property free and clear of all liens and incumbrances, the liens then existing upon said property to be transferred to the proceeds derived from the sale thereof,

> "conditioned upon the purchase price at Trustee's sale of said property and of Lots 25, 26, 27 and 28, 36, 37, 38 and 39, being sufficient to pay all of the liens against all of said property,"

and for an order, after notice to creditors, for the sale of said real property in said petition described free of incumbrance. Reference is hereby made to said petition on file and of record in this court and cause.

That under date of November 21, 1923, said R. W. Smith, Referee, made and entered an order directing this petitioner, Katie Werner, and nine other lienors, to appear before him on the 3d of December, 1923, at 10 o'clock A. M., then and there to show cause, if any they had, why the prayer of the petition last above mentioned should not be granted and why an order should not be made and entered authorizing and directing said Homer F. Allen, as Trustee, to sell said Lots 25, 26, 27 and 28, town of Chandler, and other real property, free and clear of all liens and incumbrances, the liens then existing to be transferred to the proceeds of sale, [53]

> "conditioned upon the purchase price at Trustee's sale of said property of lots 25, 26, 27 and 28 and 36, 37, 38 and 39, being sufficient to pay all of the liens against all of said property";

and further why said sale of said property, free and clear of liens and incumbrances, should not be made on or before 90 days from and after the 10th day of November, 1923. Said order further provided that service of the order to show cause be made upon the respondents therein named, including your petitioner, by depositing a copy of the order, together with a copy of said Trustee's petition in an envelope addressed to each respondent at his or her address as given in the schedules in bankruptcy or to his or her last known address in the United States Mail at Phoenix, Arizona, duly registered, postage and registry fee paid, or by the delivery of a copy thereof together with a copy of said petition to each of the parties named therein. That no copy

of said order to show cause and no copy of said petition was ever delivered to your petitioner personally or by registered mail, or otherwise, nor had she, prior to the sale hereinafter mentioned, any actual personal knowledge of said order.

(7) That on December 3, 1923, upon the hearing of said petition of the said trustee to sell free and clear of liens and incumbrances, said Referee in Bankruptcy made and entered a minute order granting the petition of said Trustee and authorized and directed him to, sell said Lots 25, 26, 27 and 28, town of Chandler, and said other real property free and clear of all liens and incumbrances.

That on the 18th of December, 1923, said Referee made and entered a formal order dated December 3, 1923, authorizing, directing and permitting said Trustee to sell and dispose of at public auction

> "and in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, within 90 days from and after the 10th day of November, 1923, all of the real property hereinafter specifically described, free and clear of and from all liens and incumbrances described in said petition and in said order to show cause and as appears of record against said property, save and except only valid and subsisting leases on the real property hereinafter described, but free from [54] the claim of any of the assignees of such leases, and that all liens and incumbrances against said

> real property be transferred to the proceeds derived from said sale, and that said proceeds of and from the sale of the said real property be held by said Trustee subject to all of the liens and incumbrances against said property, to all intents and purposes as though the said property had not been sold, except the expenses of administration, fees and commissions set forth in said stipulation hereinbefore referred to."

said Lots 25, 26, 27 and 28, town of Chandler, and said other real property. Said order further provided

> "that said stipulation referred to herein be, and the same is hereby, approved, and it is ordered that the proceeds derived from the sale of the property hereinafter specifically described be applied in payment of the liens and incumbrances as set forth in said stipulation aforesaid; that the liens and incumbrances upon said property are as set forth in said stipulation and are in the order of priority as set forth in said stipulation."

but wholly failed to direct that said sale, free and clear of liens and incumbrances, be conditioned upon the purchase price at Trustee's sale of said real property being sufficient to pay all the liens against all of said property.

That by reason of the facts herein alleged said Referee had no jurisdiction to make and enter said order of sale of December 18th, 1923, dated December 3, 1923, and the same is wholly null and void.

(8) That on or about January 10th, 1924, and for several issues thereafter, said Homer F. Allen, Trustee, caused to be published in the "Chandler Arizonan," a weekly newspaper published in the town of Chandler, Maricopa County, Arizona, a notice in the following words and figures, to wit:

"Trustee's Sale.

Thursday, February 7th, 1924, I will sell to the highest bidder for cash, the following described real property, belonging to the estate of David A. Jacobson, bankrupt,—Lot 25, town of Chandler, Lots 26, 27 and 28, town of Chandler, Lots 36 and 37, town of Chandler, Lots 38 and 39, town of Chandler. Said sale to be held in my office, Rooms 411–412, Nat'l Bank of Ariz. Building, Phoenix, Arizona. A deposit of 10% of amount must accompany each bid. Said sale to be made subject to confirmation by the bankruptcy court and the right is reserved to reject any and all bids.

HOMER F. ALLEN,
Trustee in Bankruptcy for David A. Jacobson, Bankrupt." [55]

and on or about the same time caused a similar notice to be published on the "Arizona Republican," a daily newspaper, published at Phoenix, Maricopa County, Arizona, and as your petitioner is credibly informed and believes and therefore alleges, posted copies of said notice on the premises therein described. That your petitioner is credibly informed, verily believes and therefore alleges, no notice of said proposed sale was given to the creditors of said

David A. Jacobson, bankrupt, as required by law, and no public notice of said sale whatsoever was given other than as hereinbefore alleged.

(9) That your petitioner is credibly informed, verily believes, and therefore alleges, that no sale by public auction was had or held by said Trustee at Rooms 411–412 National Bank of Arizona Building, at Phoenix, Arizona, on February 7th, 1924, or at a ıy other time or place.

Tuat on said 7th of February, 1924, at the hour of 10 o'clock A. M. or thereabouts there appeared at the office of said R. W. Smith, Referee, at Room 208, Heard Building, in Phoenix, Maricopa County, Arizona, said Arthur E. Price, attorney for Phoenix Savings Bank & Trust Company and Northern Trust Company, corporations, and holders of first mortgages on said Lots 25, 26, 27 and 28, town of Chandler, and submitted to said Referee a bid of $15,527.64 for said lot 25, and a bid of $15,547.70 for said Lots 26, 27 and 28; said bids being made on behalf of said corporation, respectively, that said (ink) at time and place said Homer F. Allen, Trustee, was present. That said bids were then and there accepted by said Referee and said real property was sold to said bidders. That said bids and the purchase price obtained at said sale were wholly insufficient to pay off all of the liens on said Lots 25, 26, 27 and 28, and were only a little more than sufficient to pay the first mortgages against the said property and the expenses of sale thereof.

That by reason of the facts before stated said sale and purchase are wholly null and void and to the

actual knowledge at that time, [56] of said Trustee and said bidders or purchasers said sale and the proceedings preliminary thereto were not so conducted as to obtain the best and highest price for said real property.

That since the appraisement of said Lots 25, 26, 27 and 28, town of Chandler, Maricopa County, Arizona, pursuant to the order of this Court as aforesaid the market value of said real property has steadily increased and always has been, and now is, of much greater value than the sums bid as herein alleged.

(10) That on the 3d of March, 1924, this Court, R. W. Smith, Referee, made and entered an order approving and confirming the sale of said lots to said purchasers and ordering and directing said Trustee to make, execute and deliver Trustee's deeds to said properties upon receipt of the purchase price therefor and to pay out of said purchase price certain sums as constituting the first mortgage liens against said properties and the expenses of the sale thereof. That reference is hereby made to said order of confirmation of sale on file and of record in this court and cause.

(11) That your petitioner is credibly informed, verily believes, and therefore alleges that the purchasers of said Lots 25, 26, 27 and 28, aforesaid, have wholly failed to pay the said Trustee the purchase price of said real property and that no Trustee's deeds have been made, executed and delivered to said purchasers.

WHEREFORE, your petitioner respectfully prays that an order be made and entered wholly

setting aside and holding for naught the hereinbefore mentioned order of sale dated December 3, 1923, the sale held pursuant thereto on February 7, 1924, and the order confirming said sale dated March 3, 1924, and for a further order directing that a copy of this petition be served upon said Homer F. Allen, Trustee, and upon said Phoenix Savings Bank & Trust Company, and Northern Trust Company, corporations, by the delivery to them of a true copy thereof, or to their respective attorneys of record; and for a further order directing said Homer F. Allen, said Phoenix Savings Bank & Trust Company, and said Northern Trust Company, to [57] appear on a date certain after such service upon them, and make answer to this petition, if any they have to make, and for due, proper and speedy hearing upon this petition and for such other and further relief as this petitioner seems to be entitled to the law and premises considered.

October 13, 1924.

(Signed) ZIMMERMAN & MULHERN,
Attorneys for Petitioner.

State of Arizona,
Maricopa County, —ss.

D. V. Mulhern, being by me first duly sworn, on his oath deposes and says that he is one of the attorneys for the petitioner in the foregoing petition; that he is making this affidavit in her behalf because of her absence from the County of Maricopa and State of Arizona, that he has read the foregoing petition and knows the contents thereof, that the

same are true of his own knowledge save and except as to the matters and things therein stated on information and belief and as to them he believes same to be true.

(Signed) D. V. MULHERN,
For Petitioner.

Subscribed and sworn to before me, this 13th day of October, 1924.

[Seal] (Signed) E. A. MARSHALL,
Notary Public.

(My com. exp. Feb. 17, 1928.)

(Endorsed on back): Filed Oct. 13, 1924., at 11 A. M. (Signed) R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above [58] and foregoing is a true, perfect and complete copy of petition of Katie Werner for order setting aside order of sale, sale of real property, and order confirming sale of real property, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [59]

In the District Court of the United States in and for the Federal District of Arizona.

PHOENIX—B-282.

In the Matter of DAVID A. JACOBSON, Bankrupt.

PROOF OF SERVICE.

State of Arizona,
Maricopa County,—ss.

I, D. V. Mulhern, of the above county and State, being first duly sworn on my oath depose and say: That on October 14, 1924, I served the petition of Katie Werner for order setting aside "order of sale," "sale of real property," and "order confirming real property," filed in the above court and cause, October 13, 1924, upon Phoenix Savings Bank & Trust Company, a corporation, and Northern Trust Company, a corporation, by depositing a true copy thereof in the U. S. postoffice at Phoenix, Arizona, enclosed in an envelope addressed to Arthur E. Price, Chandler, Arizona, attorney of record for said corporations, by registered mail, postage and registry fee paid; that I served said petition upon Homer F. Allen, Trustee of said estate, by delivering a true copy thereof to the office of A. Henderson Stockton, attorney of record for said trustee of David A. Jacobson, bankrupt, in National Bank of Arizona Building, Phoenix, Arizona.

(Signed) D. V. MULHERN.

Subscribed and sworn to before me this 14th of October, 1924.

[Seal] (Signed) O. E. SCHUPP,
Notary Public.

(My com. exp. Feb. 15, 1928.)

(Endorsed on back): Filed Oct 15, 1924, at 9 A. M. [60] R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of proof of service, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [61]

In the District Court of the United States for the Federal District of Arizona.

IN BANKRUPTCY—No. B-282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

ORDER DISMISSING PETITION.

Katie Werner, by her attorneys, Zimmerman & Mulhern, having on the 13th day of October, 1924, filed with the referee her petition praying for an order setting aside that certain order of the referee made herein on the 3d day of December, 1923, authorizing the sale of Lots 25, 26, 27 and 28, of the Town of Chandler, Maricopa County, Arizona; and also praying for an order setting aside that certain order of the referee herein made on the 3d day of March, 1924, confirming the sale of said property; and the referee having taken said matter under advisement, and it now appearing to the referee, after due and careful consideration thereof that he has no jurisdiction to hear and determine the matters presented in said petition;

It is therefore ordered that the said petition be and the same is hereby dismissed.

Dated November 8th, 1924.

(Signed) R. W. SMITH,
Referee in Bankruptcy.

(Endorsed on back): Filed Nov. 8, 1924, at 3 P. M. R. W. Smith, Referee. [62]

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of order dismissing petition, In the Matter of David A. Jacobson,

Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [63]

In the District Court of the United States for the District of Arizona.

No. B-282—PHOENIX.

(IN BANKRUPTCY.)

In the Matter of DAVID A. JACOBSON, Bankrupt.

EXCEPTIONS TO ORDER DENYING PETITION FOR REVIEW.

Comes now Katie Werner, petitioner in that certain petition, filed in the above-entitled cause, for an order setting aside that certain sale of real property of said bankrupt, to wit: Lots 25, 26, 27 and 28, Town of Chandler, Maricopa County, Arizona, heretofore made on the 7th day of February, 1924, and the order of sale and order of confirmation of said sale, by her attorneys, Zimmerman & Mulhern, and objects and excepts to the ruling and order of R. W. Smith, Referee in Bankruptcy in charge of said matter, made and entered on this 8th day of November, 1924, which ruling and order

denied her petition to set aside said order of sale, sale of real property and order confirming such sale of real property filed herein on October 13, 1924, and denied her demand that an order to show cause be issued on said petition.

Said Katie Werner further objects and excepts to said Referee's acts in refusing to sign, issue and file that certain order to Homer F. Allen, trustee, Phoenix Savings Bank and Trust Company, a corporation, and Northern Trust Company, a corporation, to show cause why the above-mentioned petition should not be granted, which order to show cause was on the 3d day of November, 1924, tendered to said Referee to be signed, issued and filed, by this petitioner.

Dated November 8, 1924.

ZIMMERMAN & MULHERN,
By (Signed) D. V. MULHERN,
Attorneys for Katie Werner. [64]

(Endorsed on back): Filed Nov. 10th, 1924, at 9 A. M. R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of exceptions by Katie Werner to order denying petition for review, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [65]

In the District Court of the United States for the Federal District of Arizona.

No. B-282 (PHOENIX).

In the Matter of DAVID A. JACOBSON, Bankrupt.

PETITION FOR REVIEW.

To the Honorable F. C. JACOBS, Judge of the District Court of the United States in and for the Federal District of Arizona:

The petition of Katie Werner, one of the secured creditors of said bankrupt, respectfully represents:

(1) That on the 8th of November, 1924, manifest errors to the prejudice of petitioner were made by R. W. Smith, Referee in bankruptcy, in charge of the above-entitled matter, in the matter of "petition for order setting aside order of sale, sale of real property, and order confirming sale of real property," filed by this petitioner on the 13th of October, 1924, and in the order of said referee made and entered on the 8th of November, 1924, denying said petition and refusing to

issue an order to show cause based on said petition and to the respondents therein and refusing to sign, issue and file said order to show cause prepared by your petitioner and tendered to said referee for such issuing on November 3, 1924.

(2) That petitioner herein, on October 13, 1924, filed with said referee a petition for an order setting aside the order of sale of Lots 25, 26, 27 and 28, of the town of Chandler, Maricopa County, Arizona, real property of said bankrupt, and for an order setting aside the sale of said real property and the order of said referee confirming the said sale. In said petition demand was made that Homer F. Allen, trustee, Phoenix Savings Bank and Trust Company, a corporation, and Northern Trust Company, a corporation, be ordered [66] to appear on a date certain after service of process upon them and make answer to said petition, if any they have, and for due, proper and speedy hearing on said petition. That, no action being taken on said petition by said referee, this petitioner, on November 3, 1924, demanded, in open court, before said referee, that an order to show cause be issued for said respondents to make answer to said petition and to show cause, if any they had, why the prayer of said petition should not be granted, and, at the same time tendered to said referee, for signing, issuing and filing a properly prepared "order to show cause" as aforesaid.

(3) That due and proper service of said petition of October 13, 1924, was had upon the respondents therein by delivery to them of true

copies thereof and proof of such service was duly filed with said referee. That on the 8th of November, 1924, said referee made and entered, without hearing, an order denying said petition and refusing to issue said order to show cause, and on the same date returned to petitioner the order to show cause theretofore prepared and left with the said referee.

(4) That the errors complained of are:

(a) Said referee erred in denying the petition to set aside said order of sale, sale of real property, and order confirming sale of real property.

(b) Said referee erred in refusing to issue an order to show cause as requested by petitioner.

(c) Said referee erred in acting upon said petition without full and complete hearing thereon.

(d) That the acts and conduct of said referee and said order are wholly arbitrary and contrary to law and procedure.

WHEREFORE, Katie Werner, petitioner herein, prays this Honorable Court that it review the acts, conduct, findings and orders of said R. W. Smith, Referee, with reference to the matters hereinbefore set [67] forth and that said referee certify said matters to the Court, and for that purpose he, the said referee, send up with said certificate all exhibits, records, orders, and testimony taken concerning the matters hereinabove mentioned and that he, the said referee, be directed to issue an order to show cause upon said petition and take and preserve all evidence and testimony in connection therewith.

November 17, 1924.

(Signed) ZIMMERMAN & MULHERN,
Attorneys for the Petitioner.

(Endorsed on back): Filed Nov. 17, 1924, at 4:3 P. M. R. W. Smith, Referee.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of petition for review, In the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [68]

In the District Court of the United States for the District of Arizona.

No. B-282—PHOENIX.

In the Matter of DAVID A. JACOBSON, Bankrupt.

AFFIDAVIT—PROOF OF SERVICE.

United States of America,
Federal District of Arizona,—ss.

I, D. V. Mulhern, of the county of Maricopa, State of Arizona, being first duly sworn on oath deposes and says: That on November 17, 1924, I served the petition of Katie Werner for review of the order of R. W. Smith, Referee, dated November 8, 1924, in the matter of her petition to set aside order of sale of real property, sale of real property, and order confirming sale, upon Homer F. Allen, Trustee, Phoenix Savings Bank and Trust Company, a corporation, and Northern Trust Company, a corporation, by delivering a true copy thereof to A. Henderson Stockton, attorney of record for said trustee, at his office in Phoenix, Arizona, and by depositing a true copy thereof in the U. S. postoffice at Phoenix, Arizona, enclosed in an envelope addressed to Arthur E. Price, Chandler, Arizona, attorney of record for said corporations, by registered mail, postage and registry fees paid.

(Signed) D. V. MULHERN.

Subscribed and sworn to before me this 18th day of November, 1924.

[Seal] (Signed) E. A. MARSHALL,
Notary Public, Maricopa County, Arizona, and Within the Federal District of the State of Arizona.

My commission expires Feb. 17, 1928. [69]

(Endorsed on back): Filed Nov. 18, 1924, at 3 P. M. R. W. Smith, Referee.

Filed C. R. McFall, Clerk. Nov. 20, 1924. United States District Court for the District of Arizona. By Chas. H. Adams, Deputy Clerk.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of Affidavit—Proof of Service, in the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said Court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas H. Adams,
Deputy Clerk. [70]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, December 9th, 1924.)
No. B-282 (PHOENIX).

In the Matter of DAVID A. JACOBSON, Bankrupt.

MINUTES OF COURT—DECEMBER 9, 1924—ORDER DENYING PETITION FOR REVIEW.

Petition of Katie Werner for reveiw herein is now heard,—

WHEREUPON, IT IS ORDERED BY THE COURT that the said petition be and the same is hereby denied.

IT IS FURTHER ORDERED that the action of the Referee in confirming the sale by the Trustee herein be, and it is hereby confirmed by this Court.

Exceptions are ordered entered on behalf of the petitioner.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, per-

fect and complete copy of minute entry of December 9th, 1924, in the Matter of David A. Jacobson, Bankrupt, No. B-282 (Phoenix), as the same appears from the original records of the same remaining in my office.

WITNESS my hand and the seal of said Court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By M. R. Malcolm,
Deputy Clerk. [71]

In the District Court of the United States, for the Federal District of Arizona.

(B-282—PHOENIX.)

In the Matter of DAVID A. JACOBSON, Bankrupt.

In Re Petition of KATIE WERNER for Review.

NOTICE OF PETITION TO REVISE.

To Homer F. Allen, as Trustee in Bankruptcy, of the Estate of David A. Jacobson, Bankrupt, and to A. Henderson Stockton, His Attorney of Record:

Notice is hereby given to you and to each of you that Katie Werner, petitioner in the above matter will, forthwith, in due and proper time and form, and in accordance with law, rules and regulations existing, prosecute in the United States Circuit Court of Appeals, for the Ninth Circuit, "petition to

superintend and revise'' those certain orders and decrees by the Honorable, the United States District Court, for the Federal District of Arizona, at Phoenix, made and entered in the above cause, on the ninth day of December, 1924, by which orders and decrees the petition for review was denied, *et cetera.*

Phoenix, Arizona, December 11, 1924.

(Signed) ZIMMERMAN & MULHERN.
ZIMMERMAN & MULHERN.
Attorneys for Katie Werner.

Received copy of the within notice this 11th day of December, A. D. 1924.

(Signed) HENDERSON STOCKTON,
Attorney of Record for Homer F. Allen, Trustee.

(Endorsed on back): Filed C. R. McFall, Clerk. Dec. 11, 1924. United States District Court for the District of Arizona. [72] By Chas. H. Adams, Deputy Clerk.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of notice of petition to revise, in the Matter of David A. Jacobson, Bankrupt, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said Court affixed this 17th day of December, 1924.

[Seal] C. R. McFALL,
Clerk.
By Chas. H. Adams,
Deputy Clerk. [73]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Wednesday, December 17th, 1924.)

No. B-282 (PHOENIX.)

In the Matter of DAVID A. JACOBSON, Bankrupt.

MINUTES OF COURT—DECEMBER 17, 1924—ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 24, 1924, TO COMPLETE RECORD FOR REVIEW.

In view of the fact that the petitioner, Katie Werner, is unable to complete the record for review within the ten days allowed, IT IS ORDERED BY THE COURT that the time of the said petitioner be and it is hereby extended to and including the 24th day of December, 1924, in which to complete said record for review.

Jnited States of America,
)istrict of Arizona,—ss.

I, C. R. McFall, Clerk of the United States Disrict Court for the District of Arizona, do hereby ertify that the above and foregoing is a true, perfect and complete copy of minute entry of December 17th, 1924, in case of David A. Jacobson, Bankrupt, No. B–282 (Phoenix), as the same appears from the original records of the same remaining in my office.

WITNESS my hand and the seal of said Court affixed this 18th day of December, 1924.

[Seal] C. R. McFALL,
By M. R. Malcolm,
Deputy Clerk. [74]

[Endorsed]: No. 4443. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of David A. Jacobson, Bankrupt. Katie Werner, Petitioner, vs. Homer F. Allen, as Trustee of the Estate of David A. Jacobson, Bankrupt, Phoenix Savings Bank & Trust Company, a Corporation, and Northern Trust Company, a Corporation, Respondents. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District

Court for the District of Arizona, and Transcript of Record in Support Thereof.

Filed December 23, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4443

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt.
KATIE WERNER,

Petitioner,

vs

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation.

Respondents.

Petition for Revision

Under Section 24b of the Bankruptacy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Arizona, and Transcript of Record in Support Thereof

Petitioner's Brief

FILED

THE CHANDLER ARIZONAN, CHANDLER, ARIZONA

No. 4443

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt.
KATIE WERNER,

Petitioner,

vs

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation.

Respondents.

Petition for Revision

Under Section 24b of the Bankruptacy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Arizona, and Transcript of Record in Support Thereof

Petitioner's Brief

THE CHANDLER ARIZONAN, CHANDLER, ARIZONA

In the United States Circuit Court of Appeals,
For the Ninth Circuit

No. 4443

In the Matter of DAVID A. JACOBSON, Bankrupt.
KATIE WERNER,

Petitioner,

vs

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation.

Respondents.

STATEMENT OF THE CASE

On July 31, 1923, David A. Jocobson was duly adjudged to be a bankrupt by the District Court of the United States for the District of Arizona, and the cause was referred, generally, to R. W. Smith, a referee in bankruptacy in said district. Thereafter the respondent, Homer F. Allen, was appointed trustee of said bankrupt's estate. (T. R. pp. 11,—13)

At the time of adjudication the bankrupt was the owner of certain real property, including lots No. 25, 26, 27, and 28, Town of Chandler, Maricopa County, Arizona. On November 20, 1923, the trustee petitioned the referee for an order to sell all the bankrupt's real property, free and clear of all liens and encumbrances, conditioned upon the price obtained at trustee's sale being sufficient to pay all of said liens and encumbrances, same to be transferred to the fund derived from the sale. (T. R. pp. 13—28)

The trustee's petition further prayed for an order upon Katie Werner, petitioner herein and the holder of second mortgage liens upon said lot 25, and lots 26, 27, and 28 of the Town of Chandler, above described, and upon the other holders of liens against bankrupt's real property to show cause why the petition should not be granted and the order of sale prayed for made. On November 21, 1923, the referee made an order directing the lien holders, including Katie Werner, to appear on December 3, 1923, and show cause, if any they had, why an order of sale, free and clear of liens and encumbrances, conditioned upon the sale price being sufficient to pay all of the liens against the real property, should not be made. (T. R. pp. 28—31)

Hearing was had and completed before the referee on the trustee's petition and the order to show cause on December 3, 1923. In response to the order to show cause, Katie Werner appeared at this hearing by counsel, but entered no objection to the making of the order as prayed for. No order of sale, nor any other

order was made on said petition on December 3, 1923, but on December 18, 1923, without further notice to Katie Werner, or other lien holders, the referee made, signed and filed an order authorizing the trustee to sell, within ninety days from Nov. 10, 1923, bankrupt's real property, including lots 25, 26, 27, and 28, above described, free and clear of all liens and encumbrances, without any condition, whatsoever, as to what the minimum sale price should be. This order explicitly directed that the sale of the real property should be at public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptacy and the General Orders of the Supreme Court of the United States. (T. R. pp. 32—38)

Later the trustee published, in two newspapers, a notice that on Feb. 7, 1924, he would sell the real property, describing it, to the highest bidder for cash, said sale to be held in his office, Rooms 411-412, National Bank of Arizona Bldg., Phoenix, Arizona. The notice stated that a deposit of ten percent must accompany each bid, that the sale was to be subject to confirmation by the Bankruptacy Court and that the right was reserved to reject any and all bids. No other notice of sale, whatsoever, was given. (T. R. pp. 39—40)

No public sale of said real property was had or held on Feb. 7, 1924, and no sale of same whatever was ever had or held at Rooms 411-412, National Bank of Arizona Bldg., Phoenix, Arizona, as advertised by the trustee. However, on that day, without any previous notice to the public or any one else, and without any

adjournment of the sale, the trustee and one Arthur E. Price, the attorney of record for the respondents, Phoenix, Savings Bank and Trust Company and Northern Trust Company, holders of first mortgage liens on lot 25, and lots 26, 27, and 28, above described, respectively, repaired to the office of the referee, R. W. Smith, at Room 208, Heard Building, Phoenix, Arizona, where at 10 o'clock in the morning of that day the trustee sold lot 25, to Phoenix Savings Bank and Trust Company, and sold lots 26, 27, and 28, to Northern Trust Company, for purchase prices sufficient only to pay the first mortgage liens thereon, and the costs and expenses of said trustee's sale, and wholly insufficient to pay Katie Werner anything on her second mortgage liens on said real property.

(T. R. pp. 39—47)

On March 3, 1924, the trustee made his return of said sales, showing the facts relative to same as above stated, and, without notice to any one, the referee confirmed the sales and ordered the trustee to pay the amounts of the first mortgage liens to the above named purchasers, respectively, and the expense of sale, referee's and trustee's commissions and the fee of the trustee's attorney. (T. R. pp. 47—54)

On October 13, 1924, the purchase price at the trustee's sale of said lots 25, 26, 27, and 28, not yet having been paid, nor the property transferred to said Phoenix Savings Bank and Trust Company and Northern Trust Company, this petitioner filed with the referee, and served on the trustee and Phoenix Savings

Bank and Trust Company, and Northern Trust Company, a petition to set aside the referee's order of sale dated December 3, 1923, the trustee's sale of said lots 25, 26, 27, and 28, and the referee's order confirming the sale, requesting in her petition, that said respondents be ordered to answer and show cause, if any they had, why said petition should not be granted. The referee refused to issue the order to show cause and on November 8, 1924, without answer or appearance by the respondents and without hearing the petition or taking the petitioner's evidence in support thereof, dismissed it for want of jurisdiction. (T. R. pp. 54—65 and 67—69)

On November 17, 1924, Katie Werner filed in the District Court of the United States for the District of Arizona, her petition for review of the acts and order of the referee under said date of November 8, 1924. said petition being duly served upon all of the respondents herein. (T. R. pp. 71—74 and 75—76)

None of the respondents filed answer to the petition for review, but the matter coming on before the District Court on December 8, 1924, for argument, said District Court, Honorable F. C. Jacobs, Judge, on Dec. 9, 1924, made and entered his order denying the petition for review and confirming the referee's order confirming the sales, to which ruling of the District Court your petitioner duly excepted. (T. R. pp. 77—78)

The matter is now before this Honorable Court on the verified petition of Katie Werner to superin-

tend and revise the order and decree of the District Court of the United States for the District of Arizona, so made and entered on Dec. 9, 1924. (T. R. pp. 1—11)

QUESTIONS INVOLVED

Disregarding the novel and arbitrary proceedure of the referee in summarily refusing this petitioner her right to be heard on her petition to set aside the order of sale and the sale itself, and to place before the court all of the facts relative to matters alleged therein, the basic questions involved are:

(1) Did the referee have jurisdiction to make the order of sale free and clear of liens and encumbrances not conditioned on the price obtained at trustee's sale being sufficient to pay the liens of the petitioner, when she had been summoned on a petition for, and ordered to show cause why an order to sell the property, conditioned upon the purchase price being sufficient to pay all of the liens on the property, and no other order, should not be made?

(2) Is the sale by the trustee of the real property of the bankrupt, without notice to creditors of such proposed sale, valid?

(3) Is the sale by the trustee of the real property of the bankrupt, at 10 o'clock in the morning of the day for which the sale had been advertised, and at different place from where the public had been informed same would take place, without adjournment or notification to the public of any change in the time or place

of sale, and without giving the public any opportunity to bid, a public sale, valid under an order for sale at public auction and under the General Orders of the Supreme Court of the United States?

SPECIFICATIONS OF ERROR.

(1) The District Court erred in confirming the action of the referee in confirming the sale, for, as a matter of law, the sale was made under an order which the referee had no jurisdiction to make. Katie Werner was brought into the Bankruptacy Court on an order to show cause why an order of sale, for a price sufficient to pay all liens and encumbrances, should not be made, and for no other purpose. The only jurisdiction obtained by the referee was to make or refuse to make an order for sale based on the trustee's petition and such order to show cause, and no other. (T. R. pp. 8 (b) 8-9)

(2) The District Court erred in confirming the action of the referee in confirming the sale for, as a matter of law, the sale by the trustee was void in that the order under which it was made provided that the sale should be at public auction in the manner and mode as prescribed by the Acts of Congress of the United States, whereas the sale was in fact a private sale and held at a place other than specified by the trustee, without due and lawful postponement or adjournment thereof. No notice of any proposed sale was given to creditors as provided by the Bankruptacy Act. (T. R. p. 9 (c)

(3) The District Court erred in denying the petition

of Katie Werner for review and in not setting aside the order of the referee dated Dec. 3, 1923, directing the sale of lots 25, 26, 27, and 28, of the Town of Chandler, free and clear of liens and encumbrances, and in not setting aside the sales of said lots by the trustee to the respondents, Phoenix Savings Bank and Trust Company and Northern Trust Company and the order of the referee of March 3, 1923, confirming said sale. The order of sale and the sale itself were void for the reasons stated in assignments of error Nos. 1 and 2, and Katie Werner was deprived of her lien on said real property without due process of law. (T. R. pp. 8-10)

ARGUMENT AND AUTHORITIES

On Assignment of Error No. 1

There can be no doubt of the power of the Bankruptacy Court to sell the property of the Bankrupt free and clear of liens and encumbrances, the liens to be transfered to the fund derived from said sale. However, as the trustee takes no title to the interest of the lien claimant, that interest cannot be divested without the consent of such holder or proper notice given him. In order to bind such a lien holder by a sale free from encumbrances he must be made a party to the bankruptacy proceedings by being served with proper process.

Factors' & Traders' Ins. Co. v. Murphy et al, 111 U. S. 738; 4 S. Ct., 679, at page 681.

In re Platteville Foundary & Machine Co., 147 Fed. 828, at page 830.

In the present case, jurisdiction was obtained over Katie Werner and her lien by the service upon her of the trustee's petition for sale and an order to show cause why such sale should not be made. The petition prayed for an order

"Authorizing and directing Homer F. Allen, Trustee in Bankruptacy of David A. Jacobson, to sell lots 25, 26, 27, 28, 36, 37, 38, and 39, of the Town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances * * *, conditioned upon the purchase price at a Trustee's Sale of said property and of lots 25, 26, 27, 28, 36, 37, 38, and 39, being sufficient to pay all of the liens against all of said property * * *." (T. R. p. 26)

And the order served upon her directed her and other lien holders to

"Be and appear before the undersigned referee in bankruptacy on the 3rd day of December, 1923, at 10 A. M., then and there to show cause, if any they may have, why the prayer of the petition hereinbefore referred to should not be granted, and why an order should not be made and entered authorizing and directing Homer F. Allen, trustee in bankruptacy of David a Jacobson, to sell lots 25, 26, 27,, 28, 36, 37, 38, and 39, Town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances, the liens now existing upon said property to be transferred to the proceeds derived from a sale thereof; * * * conditioned upon the purchase price at trustee's sale of said property and of lots 25, 26, 27, 28, 36, 37, 38, and

39, being sufficient to pay all of the liens against all of said property." (T. R. pp. 29—30)

That the service of an order to show cause is the proper method of bringing the lien claimants into the Bankruptacy Court cannot be questioned. In Kuntz vs. Young, 131 Fed. 719, at page 722, the United States Circuit of Appeals for the Eighth Circuit stated,

"An order to show cause why a certain act should not be done or a certain course pursued is the regular and approved method of giving notice of contemplated action to parties to suits and proceedings in equity and bankruptacy",

if the terms of the order are sufficienty broad to give notice of the order or decree entered. The same court in In re E. A. Kinsey Co., 184 Fed. 694, (last paragraph) referring to proceedings for a sale in bankruptacy, free and clear of liens and encumbrances, held,

"As to the other question whether the court could bring the petitioner before it by service of a rule to show cause why the petition should not be granted, we entertain no doubt.",

but thereafter stated,

"The essential feature of mesne process is that the respondent shall have notice of the claim the establishment of which may effect his interest and of the time and place for hearing."

In the case at bar, the only purpose for which Katie Werner was made a party to the proceedings was to either consent or enter her objections

to the making of an order to sell the property, free and clear, for a price sufficient to pay her lien in full and, under the process served upon her, the only jurisdiction obtained by the referee was to make or refuse to make such an order. She had no notice that any other would be made and was given no opportunity to object to or show cause why any different kind of an order should not be made.

The order actually made by the referee was that

"Homer F. Allen Esq., as trustee of David A. Jacobson, bankrupt, be and he is hereby authorized, directed and permitted to sell and dispose of, at public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptacy and the General Orders of the Supreme Court of the United States, within ninety days from and after the 10th day of November, 1923, all of the real property hereinafter specifically described free and clear of and from all lines and encumbrances described in said petition and in said order to show cause and as appears of record against said property * * * and that said proceeds of and from the sale of the said real property be held by said trustee subject to all the liens and encumbrances against said property * * *." (T. R. pp. 35—36)

This order was an entirely different order from that contemplated by the trustee's petition and the order to show cause, and greatly adverse to petitioner's interests. Katie Werner interposed no objection to the trustee's petition for the reason that she could have and did have no objection to the order prayed for being made, but it could in no wise be contended that

she would not have objected if she had been summoned to answer a petition for a sale without the condition that the price was to be sufficient to pay her lien in full.

The order of sale made by the referee, being in excess of his jurisdiction under the pleadings and process in the particular proceedings, was invalid, as were also all of the steps taken thereafter by the trustee toward the sale of the property. That an order made without jurisdiction is void and not merely voidable is too elementary to necessitate the citation of authorities.

Katie Werner had no opportunity to object to the order of sale as made, because of the proceedure of the referee in making, signing and filing it on Dec. 18, 1923, but dating it Dec. 3, 1923. (T. R. p. 28) A reasonable time for review had already expired even before the order was actually made and she had no knowledge of it until much later. The sale having been made under a void order the District Court had no power to confirm it.

ON ASSIGNMENT OF ERROR No 2.

The order of the referee under which the trustee sold the property involved herein, was that the sale should be

"* * * At public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptacy and the General Orders of the Supreme Court of the United States, * * *" (T. R. p. 35)

and the General Orders of the Supreme Court of the United States provide,

"All sales shall be by public auction unless otherwise ordered by the court."

General Order in Bankruptacy XVIII, Sub. 1.

The only valid sale possible in the case at bar would be one at public auction. Not only is the General Order cited mandatory and susceptible of only one interpretation, but a sale by a trustee in bankruptacy is a judicial sale, and must comply strictly with the order of sale.

In re Glas-Shipt Dairy Co. 239 Fed. 122;
Blanke Mfg. Co. v. Craig 287 Fed. 345.

In the latter case the United States Circuit Court of Appeals for the Eighth Circuit, referring to a sale in bankruptacy, held, in the last Paragraph on page 347:

"The general considerations governing judicial sales apply in confirmations of sales made by the trustee and such require the sale be in conformity with the terms of the order of sale."

The only notice of sale given by the trustee; that published as shown in his return of sale, stated that, on Thursday, February 7, 1924, he would sell the property to the highest bidder for cash, said sale to be held in his office, Rooms 411-412, National Bank of Arizona Building, Phoenix, Arizona. This notice fixed no time for the sale on that date and that cir-

cumstance alone would tend to prevent the attendance of possible bidders. (T. R. pp. 39—40)

While the petition of Katie Werner to the referee to set aside the sale, alleges that the property was sold by the referee and that there was no sale, or offering for sale by the trustee at the latter's office on the date set, or at any other time, and those allegations, being uncontroverted, must be taken as true; the trustee's return itself shows that the sale of the property in question was not a public sale. At some time prior to 10 o'clock on the date the public had been notified the property would be sold, the trustee and the attorney for the respondents, Phoenix Savings Bank and Trust Company and Northern Trust Company, without any attempt to adjourn the sale to a place other than the advertised one, or to notify the public that the sale would be held elsewhere, went to an office in a different part of the city of Phoenix than the place where the trustee's office is located and there, after the bid had been made and the whole matter apparently cut and dried, and a few parties requested to be present by telephone, the property was at 10 o'clock A. M. sharp, sold to said respondents for a price much below its actual value and insufficient to pay all of the liens. (T. R. pp. 40—41 and 45—46)

The public was in no way notified that the sale would be held at Room 208, Heard Building, or at that early hour in the morning, but on the contrary was informed that the sale would be at Rooms 411-412 National Bank of Arizona Building; with the impres-

sion left that the sale would last all the day of Feb. 7, 1924. The public was given absolutely no opportunity to bid on the property, for it could not and did not know when and where the property was to be sold. In other words, the action of the trustee and the purchasers absolutely prohibited a sale by free, open and public bidding; and this in face of the fact that numerous persons were interested in the sale of this property, had made investigations thereof and were prospective bidders at a public sale. (T. R. pp. 41, 46)

The public having had no opportunity to bid for the property, the trustee's sale was not a public sale but was a private one.

In re Nevada—Utah Mines and Smelters Corporation, 202 Fed. 126,
wherein the United States Circuit Court of Appeals for the Second Circuit, at page 128, stated,

"That the public be invited to attend and bid, is the essential feature of a public sale."
and held that the sale in bankruptcy in that case was a private sale because the published notice was addressed to the creditors, stockholders and other parties in interest and not to the public.

The sale being a private sale in direct contravention of the General Orders in Bankruptcy and the order of the referee under which it was made, it is void and the District Court had no power to confirm it.

Blanke Mfg. Co. v. Craig, 287 Fed. 345, supra;

Seminole Fruit & Land Co. v. Scott et al, 291 Fed. 179.

'Creditors shall have at least ten days notice by mail, to their respective addresses * * * of * * * all proposed sales of property." Sec. 58, Bankruptacy Act of 1898.

As shown by the record, no such notice of the sale in question was given. Notice to the creditors being a condition precedent to a valid sale, this sale is invalid for that reason also.

ON ASSIGNMENT OF ERROR No. 3.

Of necessity, much of our argument under assignments of error Nos. 1 and 2, must apply to this assignment. The action of the District Court in denying Katie Werner's petition for review was an affirmance of the referee's proceedure in refusing her the right to place before the court all of the facts relative to the sale by the trustee. As stated by the United States Circuit Court of Appeals for the Second Circuit:

"* * * The power to displace liens is a drastic one, and should be exercised only with scruplous attention to securing the lienor specific notice and full opportunity to protect his interest."

In re Kohl-Hepp Brick Co., 176 Fed. 340, at page 343.

And upon the filing of a verified petition alleging that she had not secured such specific notice and

such protection of her interest, she should have been granted a hearing and allowed to submit full proof of such allegations. However, the record in itself shows that the sale was void for the reasons hereinbefore stated and the District Court should have set it aside on the record alone.

Even if it could be contended that the referee had jurisdiction to make the order of sale and that the sale was a public one, and we submit that such contentions would be absolute untenable, the object of the sale in question, under the order of the court, (to use the words of the District Court in In re Ethier, et al, 118 Fed. 107, at page 108) was, to obtain the best price for the property, through open and unrestricted bidding. The conduct of the trustee and purchasers prevented the accomplishment of that object and vitiated the sale, and it must be set aside, as was done in the Ethier case.

" * * * any act of * * * the party selling, or third parties as purchasers, which prevents a fair, free, and open sale, or which diminishes the competition and stifles or chills the sale", is cause for setting same aside.

Swain v. Kirkpatrick Lumber Co., 78 So. 140, 20 A. L. R. 665, at page 671.

The fact that the sale had been confirmed by the referee, prior to the filing of Katie Werner's petition to set it aside is immaterial, for a court cannot confirm a void act. The sale in this case was void and

not merely voidable, being made under an order beyond the jurisdiction of the referee and in absolute contravention of that order. Furthermore, a court of equity will, for cause, set aside a sale made under its authority either before or after confirmation.

In re First Trust Etc. Bank, 45 Mont. 89, Ann. Cas. 1913 C., page 1327.

In re Stevenson et al, 6 Fed. 710.

In re Shea, 126 Fed. 153.

And a judicial sale may be set aside at any time or subjected to collateral atttack, where the court had no jurisdiction to order it, or for any other reason it is entirely void.

16 R. C. L. page 102.

There is no merit to the referee's theory that he had no jurisdiction to entertain the petition to set aside the sale, for, if a court has the power to order a sale it has the inherent power to set such sale aside. After reference, the referee is the court.

In re Styer, 98 Fed. 290.

The order of sale being void for want of essential notice to this petitioner as set forth in argument under assignment of error No. 1, the effect of the District Court's refusal to set the sale aside was to deprive her of her lien on the property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. For

"the fundamental requisite of due process of law is opportunity to be heard."

Grannis v. Ordean, 234 U. S. 385, 34 S. Ct. 779, at page 783.

WHEREFORE, Katie Werner prays that the order and ruling of the District Court of the United States for the District of Arizona, dated December 9, 1924, be reversed and that the order of sale, the sale and the orders confirming the sale made by the trustee in bankruptcy of said lots 25, 26, 27, and 28, of the Town of Chandler, Maricopa County, Arizona, be set aside.

Respectfully Submitted,

D. V. MULHERN

F. H. ZIMMERMAN

Of Zimmerman & MULHERN

For Petitioner.

No. 4443

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt.
KATIE WERNER,

Petitioner,

vs

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation.

Respondents.

Brief of Respondents

HENDERSON STOCKTON and EARL F. DRAKE,

Attorneys for Respondent, Homer F. Allen.

ARTHUR E. PRICE,

Attorney for Respondent, Phoenix Savings Bank & Trust Company, a corporation and Northern Trust Company, a corporation.

THE CHANDLER ARIZONAN, CHANDLER, ARIZONA

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In the United States Circuit Court of Appeals,
For the Ninth Circuit

No. 4443

In the Matter of DAVID A. JACOBSON, Bankrupt.

KATIE WERNER, Petitioner, v. HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK & TRUST COMPANY, a Corporation, and NORTHERN TRUST COMPANY, a corporation, Respondents.

In re Petition of KATIE WERNER to Superintend and Revise.

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Respondents cannot adopt the statement of the case made by petitioner for the reason that the petitioner fails to make any reference whatever to the documentary evidence in the form of stipulation, petition, objection and orders upon which the order

of the referee and of the District Court in approving the order of the referee were primarily based. When the petitioner filed her petition for revision in this court she filed no praecipe with the clerk of the lower court specifying what papers she desired to have forwarded. The clerk sent up nothing at her request; instead petitioner's counsel independently forwarded only such portion of the record as best subserved their purpose. Thereupon respondent, Homer F. Allen, filed a praecipe asking that the entire record be sent to this court and after the expiration of ten days the District Judge entered an order requiring certified copies of the entire proceedings to be forwarded as necessary for a proper review. The clerk of the lower court has but recently transmitted to this court certified copies of the entire record and they are now on file herein. In this statement of facts and brief we will accordingly be compelled to refer to the additional documents without reference to a printed transcript of them.

David A. Jacobson filed a voluntary petition in bankruptcy in the District Court of the United States for the District of Arizona, Phoenix Division, on the 25th day of July, 1923. Said Bankrupt was represented by Zimmerman & Mulhern, as his attorneys. Thereafter and on the 31st day of July, 1923, said Jacobson was adjudged a bankrupt. The matter of

his bankruptcy was referred to R. W. Smith, one of the referees of said Court at Phoenix. Thereafter respondent, Homer F. Allen was elected trustee and duly qualified. In said bankruptcy proceedings attorneys, Zimmerman & Mulhern, not only represented said bankrupt and Katie Werner, petitioner herein, but also were attorneys of record for Reuben Jacobson, Ray Jacobson, a sister of the bankrupt and Harry J. Collis (T. R. 31), all claiming to be secured creditors.

The assets of this estate consisted almost entirely of real estate, heavily encumbered. In many instances the several parcels had as many as four mortgage liens upon them. (See trustee's petition for sale of real estate and stipulation with regard to liens.) Of the total real estate coming into the hands of the trustee there are directly involved in this matter only lots 25, 26, 27 and 28 of the town of Chandler, Arizona. But, there are also indirectly involved lots 36, 37, 38 and 39, likewise of the town of Chandler, Arizona, for the reason that said lots 36, 37, 38 and 39 were sold pursuant to the same proceedings, and the same order. Respondent, Phoenix Savings Bank & Trust Company held a first mortgage lien upon lot 25. The Northern Trust Company, a corporation, had a first mortgage lien upon lots 26, 27, and 28. Suits in the Superior Court of the State of Arizona, in and for Maricopa County, were filed to foreclose said mortgages upon said real property. One Harry L. Hancock held a

third mortgage upon lot 25 and a second mortgage upon lots 26, 27 and 28. Her mortgages secured four thousand Dollars of indebtedness. Zimmerman & Mulhern, representing the bankrupt, Katie Werner and other persons, insited that action be taken by the trustee to enjoin said foreclosure actions in the state court and to obtain a sale of the above property in bankruptcy. (See Werner's petition for order vacating stipulation). The trustee took the position that the actions in the state court could not be stayed and sales be had in bankruptcy except upon stipulation of all lien claimants, for the reason that the encumbrances against the property were largely in excess of its full value. Therefore a stipulation, certified copy of which is on file herein, was entered into by all of the parties having liens or encumbrances upon the said lots 25, 26, 27 and 28, with the exception of Harry L. Hancock. Based upon this stipulation a petition was filed by the trustee for an order to sell said lots 25, 26, 27 and 28 and other real property free and clear of liens and encumbrances. An order to show cause why the property in question should not be sold was served upon counsel for petitioner herein who accepted service on behalf of Katie Werner (T. R. 31). The order to show cause, as well as the petition on which it was based had a double aspect (T. R. 29, 30) ordering the parties in interest to show cause first, why the property in question should not

be sold irrespective of the price it would bring, "*and further* why an order should not be made" that this property and other property be sold conditioned upon the purchase price being sufficient to liquidate the second mortgage upon lot 25; Katie Werner held a liens and encumbrances. Petitioner and other lien creditors who signed the stipulation agreed therein that the property in question should be sold irrespective of the encumbrances against it and made no condition whatever as to the amount which should be realized on the sale. The referee, finding no other parties interested insofar as the property here involved was concerned, on December 3, 1923 made as to this property an absolute order of sale, irrespective of the purchase price, and counsel representing petitioner, though present, made no objection thereto, as will appear from the recitals in the order (T. R. 32). Counsel representing Katie Werner, filed on December 28, 1923 a petition seeking an order vacating and setting aside said stipulation, and for an order terminating obligations and responsibilities thereunder. (certified copy of petition on file herein.) But none of the objections now raised by opposing counsel were raised by them in said petition. An answer to said petition was filed January 21, 1924, by the trustee. After a hearing where evidence was introduced, the referee made written findings of fact, conclusions of law, and an order denying the petition and adjudg-

ing the stipulation to be in full force and effect. (copies of answer and order on file herein) No review was taken.

Pursuant to the order of sale, notice was given as shown in the trustee's return on record here. No bidder appeared except the first mortgagee by their counsel, who desired to make the bid in the presence of the referee, and all parties in interest. Thereupon, the place of sale was adjourned to the referee's office in the same city, and all interested parties were notified and appeared. Thereupon the first mortgagee presented its bid, which was there accepted and approved after a hearing. Order of confirmation was entered March 3, 1924, and any agrieved party was given ten days in which to review the order approving same, (T. R. 50). Petitioner, by her counsel, was present and no review was taken.

After the sale of the property in question written objections of Katie Werner to the secured claims of the Phoenix Savings Bank & Trust Co., and the Northern Trust Co., and to allowance of fees and expenses, were filed February 12, 1924, but no objection to the manner or terms of the sale was then made. Thereafter a hearing was had, evidence was introduced and the referee entered an order overruling the objections of Katie Werner to said secured claims and to the allowance of fees and expenses. Any aggrieved party

was given ten days in which to review said order. No review was taken.

On October 13, 1924 (T. R. 65), over eight months after the sale of the property in question (T. R. 44) and over seven months after the order confirming the sale (T. R. 50, 53) Katie Werner filed before the referee a petition for an order setting aside the order of sale, the sale and order confirming sale. The referee entered an order dismissing the petition. On review the District Judge approved and confirmed the order of the referee.

ARGUMENT

The order of sale as actually entered was clearly within the jurisdiction of the referee.

Jurisdiction, in the first place, was acquired by the stipulation signed by the attorneys of Katie Werner and other lien holders. A certified copy of this stipulation is on file herein. It is dated November 8, 1923 and recites that Katie Werner is party of the third part, there being five formal parties thereto. After a recital of pending mortgage foreclosure proceedings to some of which Katie Werner was a party, there follows an agreement as to the validity and amount of various liens. Beginning on page ten of the stipulation we quote verbatim the following pertinent paragraphs:

"That the real property herein before and in this paragraph number 13 described, shall be sold by the party of the fourth part, Homer F. Allen, as trustee in bankruptcy of the estate of David A. Jacobsen on any date not later than 90 days from the date hereof free and clear of all liens against said property except leases on the same that are now valid, but from the claims of any assignees of such leases, the purpose being that the purchaser shall receive any rents accruing after the date of sale; that the lien of the parties hereto as it now exists shall be automatically and forthwith transferred from the real property to the proceeds derived from the sale thereof; that any of the parties hereto may be a bidder at said trustee's sale and the amount due the respective parties hereto in order of their mortgage lien rights may be applied in payment of the purchase price if such party is the successful bidder at the trustee's sale except that in all events there shall be paid in cash a sum equal to the expense of administration in bankruptcy upon the particular property herein described, including among other items, expenses of sale, referee's commission, trustee's fees and commission and attorney's fees of attorney for trustee. The real property described as lots 25, 26, 27, 28, 36, 37, 38 and 39 in the Town of Chandler, Maricopa County, Arizona, according to the map or plat thereof on file and of record in the office of the County Recorder of Maricopa County, Arizona."

(15) "It is further stipulated and agreed that all persons who have or assert liens upon the real property herein described shall be bound by the terms hereof upon assenting hereto in writing by the signing of this stipulation and any lien that exists in fact shall be automatically and forthwith transferred to the fund

derived from a sale of the property by the trustee to the same extent as the lien previously existed against the property itself."

(19) "Where all the persons having or asserting liens against the property described in the several first mortgages separately and the actions now pending in the state court shall fail to assent hereto or enter into a like stipulation as this stipulation within fifteen days from and after date hereof and in which said actions as to the property therein involved as a whole the Bankruptcy Court shall not have entered an order for sale free of liens and encumbrances on or before twenty days from the date hereof any one or more of such actions shall proceed in the state court of the party of the fourth part hereto shall file an answer therein and no action shall be taken in the bankruptcy proceeding to stay such suit."

(21) "Agreed and accepted by the parties hereto that Katie Werner executes the foregoing stipulation only in so far as her substantial rights and claims are involved and for the purpose of obtaining without legal formalities an order of sale of this court to sell the aforesaid described properties free from all liens and for the further purpose of causing dismissal forthwith after order of sale of any and all suits pending in the state courts affecting said properties."

Trustee in Bankruptacy of David A. Jacobson, Bankrupt, Party of the Fourth Part.

(*Signed*) Henderson Stockton, Attorney for Party of the Fourth Part.

The following persons have assented to the foregoing stipulation.

....

....

....

....

....

Phoenix Savings Bank & Trust Company, a corporation

By ....

Party of the First Part

Northern Trust Company, a corporation

By ....

Party of the Second Part.

Bank of Chandler, a corporation

By ....

Party of the Fifth Part.

(*Signed*) Arthur E. Price, Attorney for parties of first, second and fifth part.

....

(*Signed*) Zimmerman & Mulhern, Attorneys for party of the third part only.

Filed November 10, 1923.

We leave the foregoing stipulation to speak for itself. In view of it there is no opportunity for opposing counsel to argue with any show of success that the referee did not acquire jurisdiction to enter an order of sale without condition as to the amount to

be received therefrom. Without any further legal proceedings or any order toshow cause we submit that so far as the parties to the stipulation were concerned the referee would have been legally justified in entering an unconditional order of sale based only on the stipulation. As shown by the certified copies of petition and order on file herein counsel for Katie Werner subsequently sought to relieve her from the obligation of this stipulation, but only on the ground that two of the suits in the state court had not been discontinued. Nothing was alleged in the petition for relief as to lack of authority of the attorneys to sign on behalf of their client, or as to any misunderstanding as to the terms of the stipulation. Petitioner never sought to review the order denying the petition and upholding the continued effect of the stipulation.

However even though the stipulation be entirely disregarded the order of unconditional sale was clearly within the issues as presented by the petition of the trustee and order to show cause based thereon. The verified petition for the order to show cause why the real estate should not be sold, after stating the known encumbrances against the property, alleged (T. R. 23) "that your trustee cannot ascertain the amount of further encumbrances against said property for the reason that all further encumbrances on said property are likewise encumbrances upon other properties here-

in described and property not herein described," and then, after alleging the making of the stipulation in question which was described as providing for a sale free from liens with no mention made as to any condition with regard to purchase price, the petitioner prayed (T. R. 25, 26) for an order to show cause in precisely the form in which the order was issued. Note the exact wording of the two-fold issue raised in the order to show cause. First, cause was to be shown why the property in question should not be sold (T. R. 29) "free and clear of all liens and encumbrances, the liens now existing upon said property to be transferred to the proceeds derived from a sale thereof; *and further* why an order should not be made" etc. In the foregoing order to show cause we find a clear cut issue, complete in itself, followed by a semi-colon and language emphatically separating the subsequent and further order prayed for from what precedes. Consequently by the petition and order to show cause Katie Werner was served with notice that an order was sought requiring sale of the property in question, but no other property, free from liens, with absolutely no restriction or conditions as to the purchase price which must be received. Secondly, the petition and order to show cause raised another "*and further*" issue as to why the property in question *and other property not included in the first issue* should not be sold free from liens, "conditioned upon the

purchase price at trustee's sale of said property and of lots 25, 26, 27, 28, 36, 37, 38 and 39, being sufficient to pay all of the liens against all of the said property." The purpose in thus framing two issues first as to the property in question alone without condition as to selling price and second, as to this property and other property conditioned as to selling price, is made clear by the contents of the trustee's petition which recites (T. R. 23, 24) that the exact number of outstanding liens against all of the property could not be ascertained, but that by stipulation certain lien holders, including Katie Werner, had agreed that at least the property in question could be sold free from liens and encumbrances. Therefore it is evident that the trustee sought to have a separate order of sale of these lots in Chandler, Arizona free from liens and without condition as to price unless unknown lien holders, not included in the stipulation, might appear and object. If no such lien holders were found to exist then the sale of the property in question could proceed by stipulation. But to guard against possible objection by other unknown lien holders the second issue was raised and the property in question included therein with other property so as to provide for all contingencies.

We submit, therefore, that the order of sale as actually made was clearly within the scope of the petition and the order to show cause.

IRREGULARITIES IN THE ADVERTISEMENT, MANNER AND PLACE OF SALE IN QUESTION AT MOST RENDERED THE SALE VOIDABLE, NOT VOID.

(Assignments of Error Nos. 2 and 3.)

Opposing counsel, throughout their brief, contend that the judicial sale in the instant case was absolutely void and in effect concide that if it was merely voidable it cannot be set aside in this proceeding. We agree that the sale must be shown to have been absolutely void. If voidable, only, the order of confirmation cured any irregularities to which objections might otherwise have been raised. The order of confirmation operates like any other final adjudication. The rule is thus stated in 16 R. C. L. p. 83.

"Furthermore the order confirming or refusing to confirm a judicial sale is a final and conclusive judgment, with the same force and effect as any other final adjudication of a court of compentent jurisdiction determining until set aside and as against collateral attack, the rights of all parties, and concluding as by a judicial decree all matters involved in the scope of the proceeding, including those the court might have been called to pass upon had the parties chosen to have brought them forward as objections to the confirmation." (Citing several United States Court cases.)

It will be noted that the instant proceeding is not brought to review the order of confirmation. The sale was confirmed on March 3, 1923 (T. R. 50). It was not until over seven months thereafter on

October 13, 1924 (T. R. 65) that petitioner filed her petition to set aside the proceedings. If the sale was void mere confirmation or subsequent delay could not validate it. But if merely voidable the sale cannot now be attacked by petitioner.

The rule clearly announced by the authorities and supported by principle is that a court *having jurisdiction of the parties and subject matter* may confirm or ratify any departures from its order of sale provided the court might have authorized the procedure or terms of sale in the first instance. The rule is thus stated in Freeman on Void Judicial Sales No. 21:

> "It is sometimes said that a sale under a decree must pursue the directions therein contained, that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character. xxx In truth the court is not absolutely bound by the terms of its order or decree respecting the mode of the sale. xxx If the court had the power to direct the terms of the sale in the first instances, it may change them afterwards, and if any officers or any other agent of the law, or of the court in making a sale departs from the directions of the decree, the court may nevertheless, by confirming the sale, ratify his action, provided always that the terms so ratified are such as the court had power to impose in the first instance."

The foregoing language of the leading text writer on the subject of void judicial sales was quoted with approval in Bechtel v. Wier 93 Pac. 75, 77, 152 Cal.

443 in which case a decree of foreclosure specifically directed that two certain parcels of real estate be sold separately in a given order and only in case of a deficiency after a separate sale of the first should the second parcel be sold. Yet the sheriff sold both parcels in one lot. Upon collateral attack the court held that the sale was not void, but voidable only, citing other cases to the same effect. Likewise in Humboldt Society v. March 136 Cal. 320, 68 Pac 968 the same court said:

"Whether a motion to vacate a sale of property, made in execution of a judgment, on account of some irregularity on the part of the officer making the sale, should be granted rests very largely in the discretion of the court before which the motion is made; and it is immaterial whether such irregularity consists in disregarding the provisions of the statute in making the sale, or in failing to observe and follow some express direction in the judgment."

The case of Buchtel vs. Wier supra is cited with approved in the late Idaho case of Cohlan v. City of Boise 212 P. 867.

This same statement of the rule is adopted by District Judge Howley in Nevada Nickle Syndicate v. National Nickel Co. 103 F. 391. In that case there was insufficient publication of notice of a judicial sale of real estate and the publication failed to comply with act, March 3, 1893, sec. 3 (27 Stat. 751) requir-

ing that "no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notice of such proposed sale being ordered and had once a week for at least four weeks prior to sale." In holding that a departure from the statute rendered the sale only voidable the court said at page 399 of the opinion:

"The provision of the statute of the United States requiring that in all cases four weeks' notice should be given of the time of sale was intended for the benefit and protection of the judgment debtor, and created a priviledge and right which the judgment debtor in any case may insist upon or waive. In the present case the right so given was waived by the failure of defendant to make any objection upon that ground prior to the confirmation of the sale."

We earnestly request an examination of the foregoing opinion of Judge Howley, especially because of the numerous quotations therein of authorities relating to the distinction between void and voidable sales.

In Klapneck v. Kletz 40 S. E. 570, 571 (W. Va.) the court said:

"It does not matter whether the decree of sale was erroneous, or whether the commissioners acted without authority in receiving the private bids or in failing to advertise. These are all objections that could have been made before confirmation, but came too late after the sale has been confirmed without any excuse being offered why they were not made sooner

(citing earlier W. Va. cases). 'For as we have seen though a commissioner be directed to sell at public auction and he sells privately and the court confirms the sale the decree of confirmation cannot be disturbed.' "

In Griffith v. Bogert 18 How. 158, 164 execution was issued and sale occurred before the expiration of a stay of execution. In other words here was a case in which proceedings took place in direct opposi--tion to the order of the court that no such execution and sale should occur during the period referred to in the order. However the sale was later confirmed by the lower court and the Supreme Court held in effect that the trial court could confirm the sale, because it could have authorized it in the first instance. The sale was held to be merely voidable, the court saying:

"The issuing of an execution on a judgment before the stay of execution has elapsed or after a year and a day without reviewing the judgment, *the want of proper advertisements by the sheriff*, and other like irregularities may be sufficient ground for setting aside the execution or sale on motion of a party to the suit or anyone interested in the proceedings; but when the objections are waived by them and the judicial sale founded on these proceedings is confirmed by the court, it would be injurious to the peace of the community and the security of titles to permit such objections to the title to be heard in a collateral action."

In 16 R. C. L. p. 85 the rule herein contended for that a court may confirm what it might have authorized in the first instance is stated to be the law and numerous instances of departures from orders of sale are cited as mere irregularities cured by adoption and approval of the court.

"The final order of confirmation, having the effect of a final conclusive judgment, cures all irregularities, misconduct and unfairness in the making of the sale, *departures from the provisions of the decree of sale*, and errors in the decree and the proceedings under it; and if the court had jurisdiction and the officer the authority to sell, it makes the sale valid as against collateral attack even though irregular and voidable before and though grounds sufficient to have prevented confirmation existed. Thus, confirmation concludes all objections based upon the *want of proper advertisement of sale by the officer selling, irregularities in the time and place of sale or in giving the date in the notice thereof*, especially if these be trivial and such as could mislead no one, or upon the fact that the lands being sold were not in the township in which they were described to be in the notice of sale. *So although the terms of sale as reported differ from the terms of the decree under which the commissioners were acting, the confirmation of their report by the court will cure the irregularity and give the sale the same validity and effect as if they had sold upon the precise terms of the decree.* Accordingly, where commissioners sell by the acre without specific authority, the court by confirming the sale adopts and approves their act, and cures the irregularity, and confirmation concludes all questions as to the validity of the sale

grounded upon the fact that the *officer adjourned the sale to a time different from that fixed in the order of sale.*"

In Robertson v. Howard 229 U. S. 254, 264 there had been no appraisement prior to sale and the published notice of sale contained a misdescription of the property which was referred to as in "Range 1" instead of "Range 4" yet in a collateral proceeding the court held the sale was not void and used the following language.

"As regards the alleged lack of the certificate contained in the published notice, we think that much in this collateral proceeding should be deemed as mere irregularities and that the order of confirmation made by the referee was sufficient to validate the sale under the discretionary power given to the referee by section No. 70-B of the Bankruptcy act."

We now proceed to cite further authorities relating to waiver of gross irregularities in the conduct of judicial sales, all holding that provisions in orders of sale or in statutes which were intended for the benefit of the debtor or creditors may be waived by any of them. By necessary inference all of such cases hold that each sale was not void but merely voidable. After reviewing the law relative thereto we will briefly make clear how in the instant case the petitioner is now absolutely precluded from raising any objection to the sale in question which at most was merely voidable.

The general rule is stated in 35 C. J. 46 as follows:

"Where a party knows of any fact that might constitute an objection to the regularity of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation."

Citations in foot note 76: Hewit v. Sugar Co., 230 Fed. 394, 399, 144 CCA 563 (cit. Cyc); Central Trust Co. v. Sheffield, etc., Coal etc., Co., 60 Fed. 9; Nix v. Draughon, 56 Ark. 240. 19 SW 669; Cohen v. Wagner, 6 Gill (Md.) 207; Trusts, etc., Co. Ltd. V. Dow, (Alta.) (1921) 2 West Wkly 577. But see McIver v. Thompson, 117 S. C. 175 108 SE 411 (objections may be made up to time of confirmation.)

35 C. J. 34—

"When a public sale is required by *statute*, a private sale is at least voidable, and according to some authorities void, and it is immaterial, under such circumstances, that the order of court did not expressly require a public sale; but if property which should have been sold at public *judicial sale* is irregularly sold at private sale instead, with the acquienscence of one interested, he will be estopped from questioning the validity of the proceeding."

In Lansburgh vs. McCormick 224 F. 874, 876 (4th Cir.) a judicial sale occurred at a different place than that apparently required by law. An interested

party sought to have the sale vacated. After holding that the proceedings were possibly sufficient to meet legal requirements, the court said:

"But if the law were otherwise Lansburgh's conduct in requesting the judge to have the decree of sale carried out as soon as possible, in advertising the sale by pamphlet, *in making no objection though present at the sale and in filing exceptions to the report of sale which made no allusion to the error of the order of sale at Charleston, would estop him from now having the sale annuled,* since the rights of the third parties have become involved," citing Kirk vs. Hamilton 102 U. S. 68.

In the case of In Re: Burr M. F. G. & Supply Co. 217 F 16, 20 (C. C. A. 2 Cir.) The court uses the following language necessary to the opinion:

"Even in the case of serious irregularities a party loses his right by failure to make timely protest. If he has a knowldege of the defects prior to confirmation and makes no protest he loses his right by his laches and one cannot afterwards be heard with a request to have the proceedings vacated (citing) 2 Freeman on executions No. 340."

In Robinson vs. Howard 229 U. S. 254, 264, it was proved that there was a total lack of appraisement and that there was a misdescription of the property in the notice of sale. However the referee confirmed the sale and the U. S. Supreme Court held that the sale was not void, saying:

"As regards the alleged lack of appraisement and the error in the description of the property covered by the certificate contained in the public notice we think they must in this collateral proceeding be deemed as mere irregularities. At that the order of confirmation made by the referee was sufficient to validate the sale under the discretionary power given to the referee by No. 70-b of the Bankruptcy act."

We quote as follows from the headnote in the case of Keyser v. Wessel 128 F. 281 (C. C. A. 3d (Cir.)

"Where a landlord, though not having been notified of the sale of his tenants liquor stock, fixtures and licence in bankruptcy proceedings attended the sale which was made in bulk for a larger sum than was offered for the stock and fixtures and license separately and made no objection to the sale on the hearing of the petition for confirmation he thereby ratified the sale and waived the objection that he was not notified."

In the case of In re Torchis 188 F. 207, 208 (CCA 3d Cir.) the court in applying the rule of estoppel said:

"Not only did the petitioners now before the court have ample notice that the referee was being asked for an order to sell the bankrupt's real estate discharged of liens but they made no objection thereto; and after the order had been made they not only took no steps to have it reviewed by the District Court but they permitted the trustee to go on for months in the

gradual execution of the order and in the distribution from time to time of the proceeds. To use a phrase of the Vulcan Foundary Case *they consented by necessary implication to all that was done* and their belated objection cannot now be regarded with favor."

Finally with reference to the attitude of all courts concerning the desirability of upholding judicial sales whenever possible the Circuit Court of Appeals of the fifth circuit in the very recent decision (1924) contained in Arapian v. Rice 296 F. 891, 892 said:

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary every reasonable intendment will be made in their favor so as to serve, if it can be done consistently with legal rules, the object they were intended to accomplish."

We now apply the foregoing authorities and legal principles to the specific facts in the instant case. Petitioner complains of three irregularities in the proceedings relating to the sale: (1) No hour for the sale was specified in the published notice; (2) The sale occurred at the office of the referee instead of the office of the trustee where it was advertised to occur; (3) There was no literal acutioning of the property to the highest bidder.

As to the failure of the published notice to contain any statement of the proposed hour of the sale. It is doubtful whether this objection would have pre-

sented a serious difficulty even if raised prior to the order of confirmation. In R. C. L. p. 62 we find the following statement:

"In the absence of controlling directions to the contrary in statute or decree of sale, however, it seems that it is not necessary to state in the notice of sale the precise hour of the day at which the sale will be held, provided the hours are named between which it is to take place, and that the hours so named belong to the business portion of the day. Persons who see the advertisement and desire to attend the sale can easily ascertain the hour by inquiring of the parties having it in charge, while to require the advertisement to name the precise hour might lead to practical inconvenience, and often necessitate a postponement of the sale. It is sometimes very desirable for the interests of the parties to delay the sale for two or three hour, in order to await the arrival of persons expected to bid, or in consequence of a storm or some other unforseen emergency, and if a particular hour were named in all cases, the question whether the sale had been held at the hour named might be a fruitful sourse of litigation. Furthermore the above mode of advertising the sale has been so generally in use in some jurisdictions as the most convenient mode, and has been so free from evil consequence, that an advertisement in this form will not be held to be of itself, a sufficient reason for setting aside the sale, where the hours named are within the ordinary business hours of the day."

We can see no important distinction between a notice specifying that a sale will occur during certain

business hours named and a notice specifying that a sale will occur on a certain day, provided it actually occurs at time during business hours. In each case the public may by the same means ascertain the actual hour. However under the decisions previously cited this omission must be held a mere irregularity which could not render the sale absolutely void.

As to the difference in place where the sale occured. Opposing counsel have not cited a single authority holding that the adjournment of a sale from one building to another in the same town would absolutely viliate the entire proceedings. We believe that no such authority can be found. We submit that here also was at most a mere irregularity which might not be given much weight even upon a hearing prior to confirmation, unless it was affirmatively shown that bidding was prevented thereby. It is shown by the return of Sale (T. R. 40, 44) and admitted by petitioner that her counsel was present at the office of the trustee where the property was offered for sale, but as only one bidder was present the sale was adjourned to the office of the referee where the sale occured. The proceeding was informal because it was clear that there was to be no competitive bidding and the sole bidder desired the sanction of the referee. No objection was raised to the adjournment to a different office a few minutes before the actual sale occured.

As to the contention that the sale was a private

sale and not one at public auction. In this connection council cite a decision. In in re Nevada 202 F 126, (their brief p. 15) which seems to us absolutely destructive of their contention in this regard. The court soundly holds "that the public be invited to attend and bid is the essential feature of a public sale." Because in that case the notice was addressed solely to "creditors, stockholders and other parties in interest" and not to the general public the court necessarily held it was a private sale. But in the instant case the advertisement (T. R. 39) gave notice of a sale to the "highest bidder for cash" without restriction. Here the essential feature of a public sale was therefore present. As there was only one bidder on hand useless formality was not required. There is not a hint in the record that any one present was not given full opportunity to bid in the same manner as if a public auctioneer with a loud voice had been present. Here again we have at most a mere irregularity, but absolutely nothing to render void the sale.

All objections raised by petitioner relate only to irregularities or informalities in procedure and do not present anything like the serious difficulties which arose in the decisions quoted in the earlier portion of this brief. Yet in those decisions the sales were held to be merely voidable. On page sixteen of petitioner's brief only two cases are cited in chief support of counsel's contention. In Blanke Mfg. Co. v. Craig 287,

F. 345, cited, there were striking variations in the trems of the sale as actually made from the terms as stated in the published notice. In holding the sale void the court avoided any discussion of legal principles and quoted no authority except general references to Corpus Juris and Ruling Case Law merely holding that the general law of judicial sales applies to a sale by the referee in bankruptcy. The case of Siminole Fruit Co. v. Scott 291 F. 179, the other authority cited, is a District Court case involving a tax sale and it is impossible to determine therefrom when the objections were raised, whether before or after confirmation. So far as we can see the decision has not bearing whatever on the instant case.

IN ANY EVENT PETITIONER CONSENTED BY NECESSARY IMPLICATION TO SUBSTANTIALLY ALL THAT WAS DONE AND SHE IS NOW ESTOPPED FROM BELATED OBJECTIONS.

Note the sequence of conduct on behalf of petitioner by her attorneys.

1. Signature of a stipulation "for the purpose of obtaining without legal formalities an order of this court to sell the aforesaid described properties free from all liens" and conditioned only that the proceeds derived therefrom should be sufficient to pay all administration expenses, costs of sale and attorneys fees.

2. Petition asking to be relieved from the fore-

going stipulation only on the ground that certain actions in the state court had not been dismissed.

3. No review of the referee's order denying the petition.

4. Presence of petitioner's attorneys at the sale without objection as to the place or manner of conducting same.

5. After full knowledge of all proceedings no effort to avoid a confirmation of the sale, notwithstanding the sale occurred on February 7, 1924 (T. R. 40) and the order of confirmation was not made until March 3, 1924 (T. R. 24.)

6. The filing on February 12, 1924 of objections by petitioner to allowance of expenses of sale based solely on the unreasonableness of same with no mention made as to claim of invalidity of sale.

7. Delay until October 13, 1924 (T. R. 65) over eight months after sale (T. R. 44) and over seven months after order of confirmation (T. R.) before filing petition to set aside sale.

During all of the foregoing period since confirmation of sale the purchaser of this property has remained bound under contract of purchase and has suffered the risk of loss by depreciation. Surely the law will not permit a single objector thus actively to participate in proceedings before and after a sale even to the point of taking part in the determination of the allowance of fees and expenses and by her every action to indicate her ratification of substantially all that occurs, but finally to assert, over seven months thereafter, that the whole proceedings are utterly void. We

again quote the language of the Circuit Court of Appeals (4th Cir.) in Landsburgh vs. McCormick 224 F 874, 876 supra, where the court said that notwithstanding the sale was held in a different county than apparently required by statute the petitioner's conduct,

"in making no objection, though present at the sale, and in filing exceptions to the report of sale which made no allusion to the error of the order of sale at Charleston, would estop him from now having the sale annuled since the rights of third parties have become involved."

We therefore submit that the order of the District Court in denying the petition for review and in confirming the sale by the trustee should be affirmed and the petition for revision herein should be denied.

Respectfully submitted,

Henderson Stockton & Earl F. Drake,
Attorneys for Respondent Homer F. Allen.

Arthur E. Price
Attorney for Respondents Phoenix Savings Bank & Trust Company and Northern Trust Company.

No. 4443

4

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt,
KATIE WERNER,

Petitioner,

vs.

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation,

Respondents.

Petition for Rehearing

FILE

APR 1

G. G. MORGAN PRINTING CO., PHOENIX, ARIZONA

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Number 4443

PETITION FOR REHEARING

In the Matter of DAVID A. JACOBSON, Bankrupt,
KATIE WERNER,

Petitioner,

vs.

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation,

Respondents.

Comes now Katie Werner, petitioner in the above entitled cause and respectfully prays this Court for its order setting aside its decision herein, dated March 5, 1925, and granting her a rehearing of said cause on the grounds and for the reasons following, to-wit:

I.

That said decision is based on a misapprehension of the facts in that the Court failed to consider that the stipulation referred to in said decision and partially quoted therein, never became operative and

never was, in fact, a stipulation at all. This instrument expressly provided that, "It is further stipulated and agreed that all persons who have or assert liens upon the property herein described, shall be bound by the terms hereof upon assenting hereto in writing by the signing of this stipulation." See Par. 15, p. 11 of Stipulation.)

This petitioner alleged under oath in her petition to set aside this sale and the order confirming it that her attorneys signed same under the conditions that it was "intended and contemplated to the full knowledge of said firm of Zimmerman and Mulhern, said Arthur E. Price and said A. Henderson Stockton that said stipulation was to be presented to all parties having liens on said real property for their personal assent in writing and signature and that said stipulation should be personally assented to and signed by the particular lienor before becoming effective as to him or her." (Trans. of Record, line 27, page 56 to Line 4, page 57.) This allegation stands undenied and uncontroverted and therefore is admitted by respondents for the purpose of this proceeding. It is conclusively shown by the record that this stipulation was never signed or assented to by this petitioner, but on the contrary she, the next day after the signature by her attorneys and before any action had been taken thereon, or any rights instituted thereunder, notified the Referee that she would not sign or assent thereto. (See Stipulation and note at top of first page thereof.) Trans. of Record lines 4 to 8, page 57.

There being no stipulation, the filing by this petitioner of an application to be relieved of any re-

sponsibility thereunder on other grounds, because of the persistence of the Referee in assuming that there was such a stipulation, certainly would not estop her from showing that it had no existence. In other words, the Referee by ruling that the stipulation was in force could not thereby make a stipulation or an agreement for the parties without their consent. The Referee's ruling on her petition to be relieved from responsibility in no way determined that the stipulation was duly entered into, and said ruling being based on something that did not, in fact, exist, was an absolute nullity, and petitioner, to protect her interests was not required to have that order of the Referee reviewed. (See Decision of Referee on petition to be relieved from responsibilities, etc.)

II.

That this Court failed to determine the principal question in the case, that is, whether or not the sale by the Trustee was a public or private sale, and if a private sale, it was in direct contravention of Rule 18 of the Bankruptcy Rules of the Supreme Court of the United States and thereby prohibited. In this connection this Court also misapprehended the facts shown by the record in finding: "at the time and place so designated for the sale, no bidder appeared except the holder of the first mortgage, through counsel who wished to make their bid in the presence of the Referee and all parties in interest. Thereupon adjournment was taken to the office of the referee, where, in the presence of the present petitioner by her counsel and without any objection, the property in question was sold to the holder of the first mortgage thereon."

The Trustee's returns of the sale show: "That on the 7th day of February, 1924, pursuant to the notice contained in said advertisement, your trustee offered for sale at his office, Rooms 411-412 National Bank of Arizona Building the afore described real property and did not receive at said office of your petitioner any bid, but a bidder appeared there who desired to present his bid for said property to your trustee in the office of the referee in charge of the bankruptcy of David A. Jacobson." (Trans. of Record, Line 16, Page 40, and Line 27, Page 44.)

There was no adjournment of the sale from rooms 411-412 National Bank of Arizona Building to 208 Heard Building, as far as the public was concerned. The Trustee and first mortgagees, without any notice to any parties in interest, or to the public, simply agreed that the sale should be held at the latter place instead of the former and said agreement was made and acted upon before the hour when the public might anticipate the sale would be held. It is true that the **Trustee and first mortgagees** adjourned to room 208 Heard Building but this was not such an adjournment as found by this court. Had the sale been opened at the Trustee's office and held open there for a reasonable length of time on the date set therefor and then the parties present, if any, informed that it would be adjourned to the Referee's office and there continued, that would have been at most, an irregularity curable by confirmation. However, under the facts incontrovertibly shown by the return of sale, the public had absolutely no opportunity to bid and therefore under no theory could this be considered to have been a public sale. It is not the contention of this petition-

er that the sale should be set aside because of irregularities in the notice of sale, or in the place thereof or in the hours set, as was strenuously argued by respondents in their brief, but it is her contention, and she still respectfully submits, simply, that it was not a public sale but a private one prohibited by the rules of the Supreme Court of the United States.

To be now estopped from objecting to this sale by her failure to interpose objections or to file exceptions to the return of the Trustee prior to the confirmation by the Referee, as apparently held by this Court, this petitioner must be charged with the knowledge at that time or an acquiescence in the method of conducting same. (In re Torchia 188 Fed. 207; in re Burr Mfg. & Supply Co., 217 Fed. 16.) This petitioner knew nothing of what took place at the office of the Trustee on the morning of February 7, 1924, and had no way of knowing until the filing of the report and return of sale by the Trustee. (Trans. of Record pages 39—43 and 62 to 63.) She did not know but that the sale was properly and publicly open at the Trustee's office and the public given an opportunity to bid, for, contrary to the statements of counsel for respondents in their brief, she was not present or represented there, nor was any one else, except the Trustee and the attorney for the first mortgagees. (Trans. of Record pages 34 to 41.) The only thing she knew was that in the presence of her representative the property at ten o'clock A. M., was sold to the first mortgagees at a place other than the place of sale. (Trans. of Record, pages 39 to 43 and 62-63.) Only by examination of the return could she learn what occurred between the Trustee and the purchaser at the for-

mer's office on the date of sale. As a matter of fact, this examination was made by her counsel as soon as it was leared that the return had been filed some little time after the actual filing, and at that time the sale had already been confirmed by the Referee for the respective orders of confirmation were made just two minutes after the returns were filed. To be exact, the returns were filed at 11:55 a. m., and 11:54 a. m., and the orders of confirmation were made at 11:57 a. m., and 11:56 a. m., all on March 3, 1924. (Trans. of Record, pages 42, 47, 50 and 53.)

Under the circumstances, as conclusively shown by the Record, this petitioner cannot be said to be estopped by failure to object to the sale prior to the confirmation thereof.

This Court evidently considered that the fact that this petitioner took no steps to have the sale vacated until October 13th, 1924, it having been confirmed on March 3, 1924, was an element in estopping her from questioning it, but the record conclusively shows that between those dates there had been absolutely no change in the status of the matter; the purchasers had paid nothing on the purchase price; no steps toward transferring the title had been taken by the Trustee, the purchasers had in no way relinquished any rights or further obligated themselves in reliance upon the sale, and no rights of third parties had intervened. (Trans. of Record p. 63.) There is no showing or allegation whatsoever that the time taken by this petitioner was unreasonable or constituted laches in the slightest degree. It

is our understanding that estoppal by laches must be based upon some actual or highly probable prejudice to others, and such was not the case here.

We respectfully call attention to the fact that the authorities mentioned in the decision of this court and theretofore cited by the respondents to support their theory that confirmation cures all defects in the proceedings, to-wit: Robertson vs. Howard 229 U. S. 254; 16 R. C. L. 85 and Nevada Nickel Syndicate vs. National Nickel Company 103 Fed. 391, held only that confirmation validates a sale as against **collateral attack,** and then only as to minor irregularities such as lack of appraisement, errors in description, publication, etc. In fact, said 16 Ruling Case Law at page 83, restricts the rule to "Confirmation determining, **until set aside,** and as against **collateral attack,** the rights of the parties," while the present proceeding is a direct application to have the order of confirmation set aside. Furthermore, the authorities cited in support of the theory of estoppel, to-wit: In re Torchia, 188 Fed. 207; In re Burr Mfg. & Supply Co.,, 217 Fed., 16; and Landsburgh vs. McCormick 224 Fed, 874, all turn upon the knowledge of the party objecting to the sale of all defects prior to confirmation, and then in the face of that knowledge, the allowance by him of the attaching of the rights of third parties or the distribution by the Court of the proceeds of the sale, or some such changes in circumstances.

Katie Werner, in her verified petition to set aside the order of sale, the sale, and the orders confirming the sale alleged: "That your petitioner is creditably informed, and verily believes, and therefore alleges

that no sale by public auction was had or held by said trustee at Rooms 411-412 National Bank of Arizona Building, at Phoenix, Arizona, on February 7th, 1924, or at any other time or place," and "To the actual knowledge at that time of said trustee and said bidders or purchasers said sale and the proceedings preliminary thereto were not so conducted as to obtain the best and highest price for said real property." These allegations, alone, if supported by competent evidence, would certainly necessitate the setting aside of the sale, and petitioner could not, under the circumstances shown by the record, be estopped from urging such objections. (16 R. C. L. 84.) The Referee, by his order summarily dismissing the petition deprived her of her right to place before the Court her evidence in support of these allegations. (Trans. of Rec. p. 68.) In other words, altho her petition stated a cause of action, she has never had her day in court and we earnestly submit that, even if this court should find on reexamination of the record that it may not set aside the sale on such record, the cause should be remanded to the District Court with directions that the Referee take the evidence in support of and against said petition and that due action be taken on the merits as disclosed by said evidence.

Respectfully submitted,

....

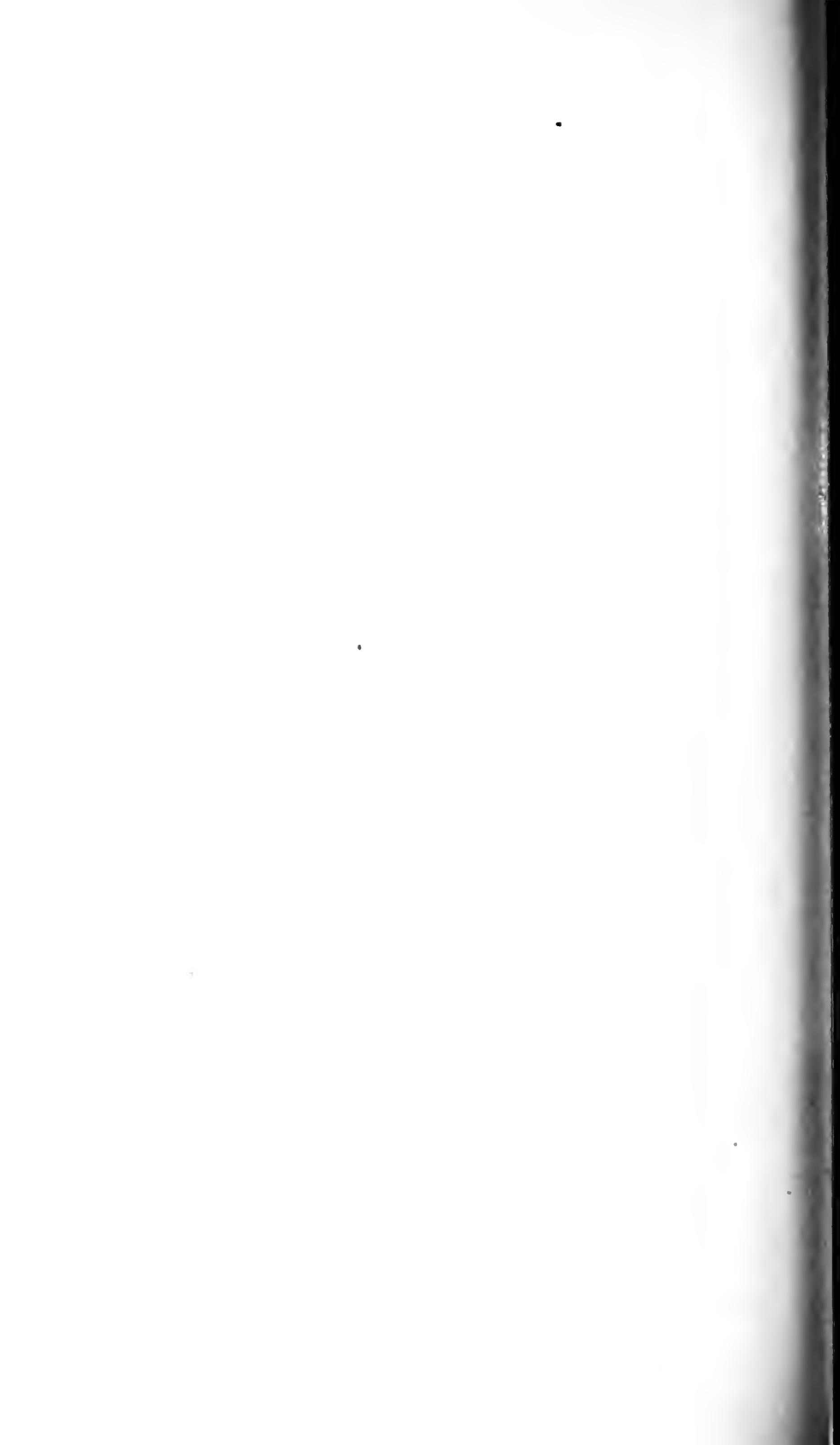
....

Attorneys for the Petitioner.

DISTRICT OF ARIZONA }
MARICOPA COUNTY } ss.

The undersigned, F. L. Zimmerman and D. V. Mulhern, attorneys for the Petitioner, Katie Werner, hereby certify that, in their judgment, the foregoing petition for rehearing is well founded and that it is not interposed for delay.

F. L. ZIMMERMAN,
D. V. MULHERN,
Attorneys for Petitioner



No. 4445

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHWEST METALS COMPANY, a Corporation,

Plaintiff in Error,

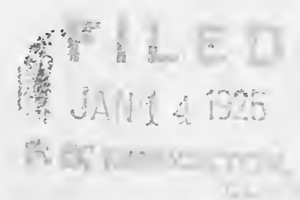
vs.

FRANCISCO GOMEZ,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4445

United States

Circuit Court of Appeals

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SOUTHWEST METALS COMPANY, a Corporation,
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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

ANDERSON & GALE, Prescott, Arizona,
Attorneys for Plaintiff in Error.

D. A. FRASER, Phoenix, Arizona,
JENNINGS & STROUSE, Phoenix, Arizona,
Attorneys for Defendant in Error.

In the District Court of the United States in and for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

DEMURRER AND ANSWER.

Comes now the above-named defendant, by its attorneys, and not waiving any of its defenses hereinbefore interposed, for answer to the complaint on file herein, demurs to said complaint upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the same does not state facts sufficient to constitute a cause of action against this defendant under the Employers' Liability Act of the State of Arizona, under which said act said complaint appears to have been filed.

III.

That said complaint does not set out facts that will support or authorize a recovery of compensatory damages for the alleged injury therein complained of.

IV.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of did not result from any accident contemplated by the said Employers' Liability Act. [1*]

V.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of were not sustained in, and did not arise out of or in the course of the employment of the said plaintiff, in the service of the defendant.

VI.

That it does not appear from said complaint that the said alleged injuries were due to a condition or conditions of the employment or occupation of the said plaintiff.

VII.

That it appears from said complaint that the injuries complained of were not attributable to any hazard or risk, or any hazards or risks which were

*Page-number appearing at foot of page of original certified Transcript of Record.

inherent in the occupation or employment of the said plaintiff.

VIII.

That it does not appear from said complaint that the injuries complained of were sustained in any labor, service or employment in any hazardous occupation within the terms and provisions of the Employers' Liability Act.

IX.

That it does not appear from said complaint that the injuries complained of were sustained while the said plaintiff was engaged as a workman at manual and mechanical labor in a hazardous occupation defined to be hazardous by said Employers' Liability Act.

X.

That it does not appear from said complaint that the alleged accident and injuries resulting therefrom, if any such resulted, were due to the risk and hazard or risks or hazards which are inherent in a hazardous occupation as defined by [2] said Employers' Liability Act, and which were unavoidable by the said plaintiff, while engaged in said hazardous occupation or employment within the terms and meaning of said Employers' Liability Act.

XI.

That it appears on the face of said complaint that the injuries complained of were caused by the negligence of the said plaintiff.

XII.

That it does not appear from said complaint that

the plaintiff has any right of action against the defendant for the alleged injuries.

XIII.

That it appears from said complaint that the plaintiff has no right of action against the defendant for the injuries complained of.

XIV.

That it appears from said complaint that the accident complained of, and the injuries resulting therefrom, if any such there were, were not due to an inherent risk or hazard of said plaintiff's employment, but that the same resulted from conditions and causes that were well known to the said plaintiff, and that he assumed the risk and hazard of injury therefrom.

XV.

That it appears from said complaint that the accident complained of and the injuries resulting therefrom, if any such there were, was not due to an inherent risk or hazard of the said plaintiff's employment, but that the same resulted from conditions and causes that were well known to him, and that he could have avoided the same and the resultant injuries [3] therefrom, if any such there were, by the exercise of that degree of care and caution required of him by the terms of the said Employers' Liability Act.

XVI.

That it appears that said complaint does not state facts permitting a recovery under the terms and conditions of the Employers' Liability Act of Arizona, or any amendment thereof, in this, to wit:

That it does not show that said injuries complained of, if any such there were, were due because of risks and hazards, or a risk and hazard, which are inherent in the hazardous occupations set forth in said act, and which are unavoidable by the workmen therein, and, further, that it fails to show that the injuries complained of were caused in the course of work at manual and mechanical labor, or manual or mechanical labor, in any of the employments or occupations enumerated in said Employers' Liability Act by any accident arising out of, and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, and, further that it fails to show that said injuries complained of were not caused by the negligence of the said plaintiff.

XVII.

That said complaint shows that said injuries complained of were not due solely to an accident arising in the course of the employment of the said plaintiff, and said injuries were not due solely to the inherent conditions, risks and hazards of his said employment and occupation.

XVIII.

That said complaint shows that plaintiff is claiming damages other, greater and different than the damages recoverable under said Employers' Liability Act. [4]

XIX.

That it appears upon the face of said complaint, that said action is based upon the Employers' Liability Act of the State of Arizona, and that the said

Employers' Liability Act is unconstitutional and void, and in violation of Sections 5 and 7, of Article 18 of the Constitution of the State of Arizona, in that it, upon its face, prevents the defense of contributory negligence and assumption of risk from being submitted as questions of fact, at all times to the jury, and in that it deprives the defendant of the defense of contributory negligence, and in that it attempts to deprive the defendant of the defense that the injured workman has assumed the risk.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

ANDERSON, GALE & NILSSON,

Attorneys for Defendant.

ANSWER.

Comes now the defendant above named, and not waiving any defense hereinbefore interposed, for further answer to said complaint says:

I.

Denies each and every, all and singular, the allegations of said complaint, except such as are herein expressly admitted.

II.

Denies that by reason of any of the matters and things set out in plaintiff's said complaint, the said plaintiff has been damaged in the sum alleged in said complaint, or in any other sum whatever. [5]

III.

Denies that plaintiff was engaged in manual and mechanical labor, or manuul or mechanical labor in any employment or occupation declared to be haz-

ardous by the Employers' Liability Act of Arizona, at the time he sustained the alleged injuries complained of. Denies that such injuries, if any such there were, were due to an accident. Denies that such injuries, if any, arose out of, or in the course of the labor and employment of the said plaintiff in any such hazardous occupation. Denies that said injuries, if any, were due to a condition or conditions of the occupation or employment of plaintiff at the time he received such injuries. Denies that said injuries, if any, were due to any risk or hazard, or risks or hazards inherent in the occupation or employment in which the said plaintiff was then engaged.

IV.

Defendant alleges the facts to be that the injuries sustained by plaintiff, if any such there were, were caused by the negligence, carelessness, fault and improper conduct of said plaintiff, and would not have occurred but for his negligence, carelessness, fault and improper conduct, and that the said plaintiff's carelessness, negligence, fault and improper conduct was the proximate and direct cause of his said injuries, if any such there were.

V.

Defendant alleges the fact to be that the injuries sustained by plaintiff, if any such there were, were caused by the violation by him of the orders, rules and regulations and instructions promulgated by the defendant for the safety of said plaintiff and his coemployees, and for the protection [6] of its property, and he had full and complete knowledge

and notice, prior to his violation of the same, of said orders, rules, regulations and instructions.

VI.

Defendant alleges that the accident resulting in the injuries to plaintiff, if any, was not due to an inherent risk or hazard of his employment or occupation, but that the same resulted from conditions and causes that were well known to him, and that he assumed the risk and hazard of injury therefrom.

VII.

Defendant denies that plaintiff is entitled to recover in this cause of action, any damages under and by virtue of the Arizona Employers' Liability Act, or any amendment thereof.

VIII.

Defendant denies that plaintiff has any right of action against the defendant for the alleged injuries complained of.

IX.

Defendant alleges that plaintiff has no right of action against the defendant for the alleged injuries complained of.

X.

Defendant denies that plaintiff, in the course of work in any of the employments or occupations enumerated in the said Employers' Liability Act, received injuries by any accident arising out of and in the course of manual and mechanical, or manual or mechanical labor, service and employment, and due to a condition or conditions of such occupation or employment. [7]

XI.

Defendant denies that plaintiff, at the time of said injuries so received by him, if any such there were, was in the exercise of due care and caution, but alleges the fact to be that said accident and the resultant injuries, if any such there were, were caused by his negligence.

XII.

Defendant denies that plaintiff was injured by any inherent risk or hazard in his alleged occupation which was unavoidable by him.

XIII.

Defendant denies that plaintiff has suffered any pecuniary loss by reason of the matters and things set forth in said complaint, and denies that he has suffered any injuries that would sustain a verdict or judgment for compensatory damages, or any damages against this defendant.

WHEREFORE, defendant prays judgment that plaintiff take nothing by said complaint, and for its costs.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: Demurrer and Answer. Filed Sep. ., 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [8]

In the United States District Court in and for the District of Arizona.

Regular September, 1923, Term, at Prescott.
Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, September 10th, 1923.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—SEPTEMBER 10, 1923—ORDER SUSTAINING DEMURRER.

Attorneys I. A. Jennings, C. L. Strouse, and D. A. Fraser, are present for the plaintiff. Messrs. Anderson, Gale & Nilsson appear for the defendant.

IT IS ORDERED that defendant's general demurrer to plaintiff's complaint is hereby sustained, and the plaintiff is given ten (10) days to amend said complaint.

IT IS FURTHER ORDERED that this case is passed for future setting. [9]

In the District Court of the United States in and for the District of Arizona.

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff, and for a cause of action against the defendant, complains and alleges:

I.

That the defendant now is, and was at all times hereinafter mentioned, a corporation, duly organized and doing business within the County of Yavapai, State of Arizona; that the said defendant is the owner of and engaged in operating mines within the aforesaid County and State.

II.

That this is a suit between citizens of different States, the plaintiff being a citizen of the State of Arizona; the defendant being a citizen of the State of Delaware; that said suit involves exclusive of interest and costs, a sum in excess of Three Thousand ($3,000.00) Dollars, to wit, the sum of Ten Thousand ($10,000.00) Dollars.

III.

That heretofore, and on the 13th day of June,

1923, the defendant had in its employ the plaintiff, working as a manual laborer, in and about the aforesaid mines of said defendant; that on said date, the plaintiff was injured by an accident arising out of and in the course of his labor, service and employment, and due to a condition or conditions of such occupation or employment; that the said accident and injuries resulting therefrom, were not due to or caused by plaintiff's own negligence; [10]

That plaintiff sustained said injuries in substantially the manner following:

The plaintiff on said date was employed and at work, as a miner, in one of said defendant's mines, know as the Blue Bell mine, and on the 1200 ft. level thereof, in stope No. 40, and in the usual course of his employment was picking rock with a bar, when a small piece of rock, dust or debris dropped from the roof of said stope, striking the plaintiff in the left eye, injuring said left eye; that as a result of said injury to said eye, and without fault on the part of this plaintiff, the said eye became infected, and the plaintiff's vision in his said left eye was permanently and totally destroyed; that by reason thereof, the plaintiff has suffered great physical pain and has been disabled from following his usual occupation of a miner and manual laborer; all to his damage in the sum of Ten Thousand ($10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Ten Thousand ($10,-000.00) Dollars and for his costs.

D. A. FRASER,
JENNINGS & STROUSE,
Attorneys for Plaintiff.

[Endorsed]: Amended Complaint. Filed Sept. 17, 1923. C. R. McFall, Clerk. By M. R. Malcolm, Deputy.

Copy of the within amended complaint received this 17th day of September, 1923.

ANDERSON, GALE & NILSSON. [11]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, June 26th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JUNE 26, 1924—ORDER APPOINTING PHYSICIAN TO MAKE PHYSICAL EXAMINATION OF PLAINTIFF.

Comes now the defendant, Southwest Metals Company, by its counsel, Anderson, Gale & Nilsson, Esqs., and on motion of said counsel,

IT IS ORDERED BY THE COURT that Dr. Robert A. Buck is hereby appointed to make a physical examination of the plaintiff, Francisco Gomez, at the office of Dr. Buck, said examination to be made not later than five days before the date set for trial of this case, and the said plaintiff is hereby directed to be so examined. [12]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, July 28th, 1924.)

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JULY 28, 1924—ORDER OVERRULING DEMURRER TO AMENDED COMPLAINT.

I. A. Jennings, Esq., is present for the plaintiff.

Messrs. Anderson, Gale & Nilsson, Esqs., appear for the defendant.

IT IS ORDERED that defendant's demurrer to amended complaint herein be and the same is hereby overruled, and the case is set for trial August 6, 1924, at 10 o'clock A. M.

IT IS FURTHER ORDERED that the plaintiff, Francisco Gomez, appear before Dr. Robert A. Buck at his office at Fort Whipple, Arizona, on or before August 4th, 1924, and submit himself for physical examination by said physician as to the injuries alleged in the complaint herein in order to qualify said physician to give testimony in reference to same at trial of this case;

IT IS FURTHER ORDERED that a representative of both parties may be present at said examination. [13]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, August 7th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—AUGUST 7, 1924—TRIAL.

This cause comes on regularly for trial this date. D. A. Fraser, Esq., and I. A. Jennings, Esq., appear for the plaintiff, Francisco Gomez; Leroy Anderson, Esq., and A. H. Gale, Esq., appear for the defendant, Southwest Metals Company.

Both sides announce readiness for trial, whereupon, D. A. Little is duly sworn as court reporter. A jury of twelve men is duly empaneled according to law and the rules and practice of this court, and by the clerk duly sworn to try the case. All jurors now in attendance and not selected to try this case are ordered excused for the term.

The complaint and answer are read to the jury by respective counsel.

Gregorio Ruiz is duly sworn as Spanish interpreter.

To maintain this case, the plaintiff, Francisco Gomez, is duly sworn and examined as a witness.

The plaintiff calls Francisco Lopez who was sworn and examined.

Thereupon, the plaintiff rests, with the exception of one witness to be called later.

To maintain its case, the defendant calls the following witnesses who are duly sworn and examined:

R. T. Franklin.
Chas. S. Vivian.
Dr. Robert C. Buck.
Tessie M. Benedict.

Thereupon, further trial is ordered continued to 9:30 A. M., August 8th, 1924. [14]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, August 8th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—AUGUST 8, 1924—TRIAL (CONTINUED).

The plaintiff, respective counsel and the jury are all present pursuant to adjournment, whereupon, further trial is resumed.

The plaintiff calls Edwin C. Bakes as a witness, who is duly sworn and examined, and the plaintiff rests.

The defendant moves for a directed verdict, which motion is by the Court denied.

In continuance of its case, the defendant recalls Dr. Vivian for further examination.

The defendant also calls the following witnesses, who are duly sworn and examined.

Wm. H. Culp.
Thos. S. Davey.
W. W. Swiney.
Joseph L. White.
Geo. H. Roseveare.
E. A. Gatterdam.
Paul C. Christian.

Defendant's Exhibit No. 2 (accident report) is admitted and filed.

Plaintiff's Exhibit No. 1 (a card) is admitted and filed.

Thereupon, the defendant rests.

The defendant now moves for a directed verdict, which motion is by the Court ordered denied.

The plaintiff recalls Dr. Bakes in rebuttal for further examination, and closes its case. [15]

I. A. Jennings, Esq., counsel for the plaintiff makes argument to the jury, the defendant waives argument.

Thereupon, the Court instructs the jury; two bailiffs are duly sworn to take charge of the jury, and the jury retire at 4:15 P. M. to consider of their verdict.

At 7:55 P. M., all counsel being present, the jury return into the courtroom and report that they have agreed upon a verdict, and thereupon, through their foreman, the jury return the following verdict:

No. L–151 (PRESCOTT).

"FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at One Thousand Dollars.

E. C. SUMAN,
Foreman."

Thereupon the jury is ordered discharged for the term. [16]

PLAINTIFF'S EXHIBIT No. 1.

Copy.

CONSOLIDATED ARIZONA SMELTING CO.
Humboldt, Arizona.

Blue Bell Dept.

Date—July 19, 1923.

Mr. .... Foreman
Supt.

Mr. FRANCIS GOMEZ ....
(Occupation)

is discharged from the hospital this date and able

to return to duty, having laid off for the following reasons: Injury of left eye Cornia ulcer.

Date entered hospital—July 14.

Date discharged hospital—July 19.

DR. R. T. FRANKLIN,
Chief Surgeon.
sp. P— P. CHRISTIAN.

[Endorsed]: Plaintiff's Exhibit No. One. Admitted and filed Aug. 8, 1924. C. R. McFall, Clerk. Case No. L-151. Gomez vs. S. W. Metals Co. [17]

DEFENDANT'S EXHIBIT No. 2.

(Front side)
CONSOLIDATED ARIZONA SMELTING CO.
File A550.

——————— Department.
BLUE BELL MINE—Mine.
May 8th, 1919. 19——.

If accident involves serious or fatal injury telephone immediately to the Hospital and safety Department, also when an inquest is to be held.

(1) Injured person's name—FRANC GOMEZ. Nationality: Mexican.
(2) About how old? 37 yrs.
(3) Occupation: Stoper Miner. Pay-Roll No. 133.
(4) Daily Wage? $4.65.
(5) Married or single: Married.
(6) Address: Blue Bell Mine.
(7) City or town: Mayer.
(8) State: Arizona.

(9) In whose service: Cons. Arizona Smelt. Co.
(10) General Duties: Operating Stoper Machine.
(11) How long employed prior to accident? 1 yr. 6 mo.
(12) How long employed in this work? 1 yr. 6 mo.
(13) Experienced: Had he performed similar work prior to this employment? Yes. Was he engaged in his regular occupation at the time of the injury? Yes.
(14) Was the injured person familiar with the work engaged in, or the machine being operated at the time of the accident? Yes. State experience so far as known.
(15) Was he in full charge of machine, to what extent, could he start and stop at will?
(16) Was the machine sound and in good working order at the time of the accident?
Last inspected?
Probable period of disability?
(17) Nature and extent of injury? Piece of rock hit him in the left eye. (Be definite, if hand or foot state which.)
(18) Name of attending Surgeon, if any attending? None.
(19) First aid given, by whom? F. C. Hinman.
(20) Sent or taken to Hospital? Yes.
(21) Has he returned to work? Yes. If so, when? May 16th, 1919. Off 7 days only —May 8th to 15th, inclusive.
(22) Did the injured employee ever give notice of any defect in ways, work or apparatus

connected with accident, and if so, was such defect remedied?

(23) Did the injured person make any statement after the accident as to its cause, or admitting his carelessness, and if so, what did he say, and who heard his statement?

(Stamped): Deft. Exhibit No. 2, offered for Identification. Case No. L–151. C. R. M.

Defendant's Exhibit No. 2. Admitted and Filed Aug. 8, 1924. C. R. McFall, Clerk. Case No. L–151. Gomez vs. S. W. Metals.

(See over) [18]

(Reverse side.)

THE ACCIDENT.

Date: May 8th, 1919. Hour: 2:30 A. M. Place: 1045 Stope.

(25) What light was there at the time and place of the accident? Carbide lamps.

(26) Name of the Foreman in charge, and what was he doing? Frank Chamis—Shift Boss.

(27) Names and addresses of all persons who witnessed the accident, or claim to have witnessed it, or who would probably know anything about it:

(28) Was the injury due to want of care on the part of the injured person, or negligence of any other person; if so, whom?

(29) Explain how the accident happened, its cause, etc. If necessary, illustrate by

rough sketch: Hit in left eye by piece of flying rock.

J. L. WHITE,
Supt.
(Position.)

No. L–151—PRESCOTT.

FRANCISCO GOMEZ,

Plaintiff,

Against

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at One Thousand Dollars.

E. C. SUMAN,
Foreman.

[Endorsed]: Filed August 8, 1924. C. R. McFall, Clerk. [19]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, August 8th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—AUGUST 8, 1924—JUDGMENT.

This cause having come on regularly for trial on the 7th day of August, 1924, the plaintiff appearing in person and by his counsel, D. A. Fraser, Esq., and I. A. Jennings, Esq., and the defendant appearing by its counsel, Leroy Anderson, Esq., and A. H. Gale, Esq., and a jury of twelve men having been duly empaneled, and evidence having been submitted to the jury both by the plaintiff and the defendant, and thereupon the cause having been argued and submitted to the jury for its consideration, and the jury having returned a verdict in favor of the plaintiff and assessing his damages

at $1,000.00, now after due consideration and the Court being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that, pursuant to the verdict herein returned, the plaintiff, Francisco Gomez, do have and recover of and from the defendant, Southwest Metals Company, a corporation, the sum of One Thousand Dollars ($1,000.00), together with his costs herein sustained taxed at the sum of Eighty Dollars and Seventy cents ($80.70) [20]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, August 12, 1924.)

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—AUGUST 12, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

Comes now the defendant, Southwest Metals Company, by and through its counsel, LeRoy Anderson, Esq., and on motion of said counsel,

IT IS ORDERED BY THE COURT that time to file bill of exceptions herein be extended fifty (50) days in addition to the 10 days allowed by law, or sixty (60) days after August 9th, 1924. [21]

In the District Court of the United States in and for the District of Arizona.

No. L-151—PRESCOTT.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MOTION FOR NEW TRIAL.

Comes now the defendant above named and moves the Court for an order setting aside the verdict returned by the jury in the above-entitled cause and to grant to this defendant a new trial, for the following causes materially affecting the substantial rights of this defendant:

I.

That the Court erred in overruling defendant's demurrer to the complaint herein.

II.

That the Court erred in overruling defendant's motion for a directed verdict, made at the close of plaintiff's case and renewed at the close of all of the evidence.

III.

That the law, upon which said complaint and cause of action, is based, to wit: The Employer's Liability Law, of the State of Arizona, is unconstitutional and void, as being in violation of the Fourteenth Amendment of the Constitution of the United States.

IV.

That the plaintiff failed to prove all of the material allegations of his complaint.

V.

That the verdict is contrary to the law and the evidence. [22]

VI.

That the evidence shows without conflict that the plaintiff was not injured, as alleged in his complaint, or otherwise, or at all, while in the employ of the defendant.

VII.

That the evidence shows without conflict that the plaintiff's injuries were received prior to the time complained of.

VIII.

That the verdict is contrary to the law and the evidence and has no support in the evidence.

That there is no evidence that will support a verdict for One Thousand Dollars ($1,000.00); that said verdict should either have been for the defendant, or an amount in excess of the amount returned.

IX.

That the jury disregarded the instructions of the Court in arriving at its verdict, and that said verdict is not compensatory, as defined and set forth in the instructions of the Court.

X.

Error of the Court in refusing and admitting evidence.

XI.

Errors in law occurring at the trial.

Abuse of discretion on the part of the Court, by which the defendant was prevented from having a fair trial.

Insufficiency of the evidence to justify the verdict.

Said errors in law being as follows:

1. Overruling of demurrer to amended complaint.

2. Overruling of our objection to the introduction of any evidence on behalf of the plaintiff at the opening of the case.

3. Error in refusing to direct a verdict at the close of plaintiff's case, and refusing to direct a verdict [23] at the close of all the evidence.

4. In sustaining an objection to the defendant's cross-examination of Dr. Bakes.

5. In refusing to permit defendant to show said witness' interest, bias and prejudice in the case.

6. In sustaining objections to defendant's offer to show that Dr. Buck was appointed under the statute, under the law of Arizona, permitting such examinations of plaintiffs, by disinterested physicians.

7. In refusing to permit Dr. Franklin to testify on the ground that his testimony was not privileged and (second) on the ground that plaintiff had made statements as to what the doctor did, and that the doctor, even though the privilege were claimed, had a right to testify in contradiction of the statement of plaintiff, that he took nothing from said eye, irrespective of the proposition as to any treatment that the physician gave to the plaintiff, or as to any testimony concerning the condition of said eye.

XII.

The Court erred in refusing to permit the nurse to testify, she being present at the time the first examination of said eye was made, and was able and willing to testify to the condition of the same and to the treatment given, said nurse not being within the statute, and her evidence not being privileged.

XIII.

The Court erred in sustaining an objection tc the evidence offered by Dr. Vivian and Gatterdam,

and abused his discretion in refusing to permit Dr. Vivian and Gatterdam to answer the hypothetical question based upon the testimony of Dr. Buck and Mr. Culp; said error being particularly manifest on account of the fact that plaintiff had claimed his privilege to prevent the attending physicians from testifying as to the condition of the eye when plaintiff reported to the hospital, and in further view of the fact that plaintiff had secured another physician to testify for and on his own behalf as to the present condition of said eye. [24]

XIV.

That the Court erred in refusing to permit defendant to prove, or offer evidence in support thereof, that plaintiff had accepted full settlement and signed a release for a previous injury to said left eye, and in refusing to permit Dr. Vivian to testify that he had operated, previously, upon said plaintiff's left eye; that the evidence of Dr. Vivian was offered to show that the operation was performed, and not to show the nature and character of said operation, the fact of the operation not being privileged, particularly in view of the fact that plaintiff had testified concerning said operation.

XV.

Said evidence is insufficient in the following particulars:

That there was no evidence to support a verdict for One Thousand Dollars ($1,000.00).

That the evidence tended to prove either of the following:

1. That the plaintiff was not entitled to recover any damage; and

2. If entitled to recover, more than One Thousand Dollars ($1,000.00).

That the loss of the eye, if defendant was responsible for the same, could not be compensated for in the sum of One Thousand Dollars ($1,000.00).

That there is a fatal variance between the allegations of the complaint, and the proof;

That there is no evidence tending to show that the infection was a result of the injury or that the infection caused the loss of the eye, and there is no evidence tending to show that the injury complained of caused the loss of said eye.

WHEREFORE, defendant prays that said verdict and judgment as rendered thereon, be set aside and a new trial granted herein.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

I hereby consent to filing of the within motion.

F. C. JACOBS,
U. S. Dist. Judge.

[Endorsed]: Motion for New Trial. Filed August 12, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy. [25]

In the District Court of the United States in and for the District of Arizona.

No. L–151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on the 7th day of August, 1924, the above-entitled case came on for trial at Prescott, Arizona, upon the issues joined herein, before the Honorable F. C. Jacobs, Judge of the United States District Court, in and for the District of Arizona, siting in the City of Prescott, Yavapai County, Arizona.

A jury was duly empaneled and sworn and thereupon the respective parties offered and introduced the following evidence and exhibits of evidence and the following evidence and offers of evidence were rejected and objections and motions were made and rulings of the Court entered and exceptions duly taken by the parties as follows, to wit:

APPEARANCES:

D. A. FRASER, Esq., and Messrs. JENNINGS and STROUSE for the Plaintiff, and Messrs. ANDERSON, GALE & NILSSON, for the Defendant. [26]

PLAINTIFF'S EVIDENCE IN CHIEF.
(Page 4, Transcript of Evidence.)

TESTIMONY OF FRANCISCO GOMEZ, ON HIS OWN BEHALF.

FRANCISCO GOMEZ, plaintiff, a witness on his own behalf, being first duly sworn through the Interpreter, GREGORIO B. RUIZ, testified as follows:

Direct Examination by Mr. JENNINGS.

My name is Francisco Gomez. I am the plaintiff in this case.

Thereupon the defendant made the following objection to the introduction of any evidence:

Mr. ANDERSON.—Under Chapter 5, known as the Employers' Liability Law of the state. Said amended complaint does not state a cause of action against the defendant, because he expressly alleges that it is brought under said act, section 3158, of said act being the clause of the statute which gives the right, if any, under this law.

My specific objection is this, your Honor. In paragraph 3 of the amended complaint, they allege that plaintiff on said date was employed and at work as a minor in one of said defendant's mines

(Testimony of Francisco Gomez.)
known as the Blue Bell Mine, and on the twelve hundred foot level thereof, in stope No. 40, and in the usual course of his employment, was picking rock with a bar, when a small piece of rock, dust or debris dropped from the roof of said stope, striking the plaintiff in the left eye, injuring said left eye. My first objection is that it is not specific enough in alleging what struck the eye. I will say, incidentally, however, that I am not relying upon that. I don't think it is good pleading and I think it is objectionable, but what I think is the fatal objection to this complaint follows. I want your Honor to notice that they say injuring said left eye and there is a semicolon; "That as a result of said injury to said [27] eye and without fault on the part of this plaintiff, the said eye became infected and the plaintiff's vision in his said left eye was permanently and totally destroyed."

The COURT.—They claim it is not the injury, but the infection.

Mr. ANDERSON.—That is the point exactly. The law provided that we are responsible, other things bringing us within the law, for an accident which results in injury or death, and we are liable only for the accident.

The objection to the introduction of evidence was overruled and an EXCEPTION was requested and allowed. (Page 6, Transcript of Evidence.)

(Testimony of Francisco Gomez.)

FRANCISCO GOMEZ, the plaintiff, thereupon was recalled to the stand.

On June 13th, 1923, I was working for the Southwest Metals Company at the Blue Bell Mine, near Mayer, Arizona. I first went to work for the Company in 1918. I worked about two (2) years and quit in 1920. I went back to work there in January, 1923, as a mucker. On June 13, 1923, I was working as a machine man on the twelve hundred foot level and the 40 stope. The shift went on at 7:30 in the evening and came off at 3:30 in the morning. My wages were about $5.12. My duties were drilling with this machine.

The place where I was standing was about thirty feet above the floor of the level and the roof was about eight feet from the ground upon which I was standing. My duties were to drill, blast, and then trim the fa*c*t of the roof so as to have no loose hanging rock there. I blasted at 11:30. After the blasting I went to pick the roof to make it solid, that is when I got hurt. It is necessary to pick the roof because loose rock might fall. I had a partner who was giving me light with his lamp. I was using a pick. When I picked at the rock that was [28] above, the piece of rock flew and hit me in the eye. My partner's name was Francisco Lopez.

I had been working as a machine-man for about five months. I had picked rock down from the roof all of the time. I know how I should do that and on June 13th did it the same as I always did. My partner saw the rock hit me in the eye and then

(Testimony of Francisco Gomez.)
I told him my eye was hurt and he came over and cleaned my eye. I was struck in the eye about 1:30 in the morning. After that I went down to the level to get out, but I could not get a skip at the time, so I waited around till the shift went off at 3:30. When I got on top to report hurting my eye I told the shift boss I was hurt. I waited for him about fifteen minutes. I did not see the foreman, and then went to my house and washed my eye with water. Next morning I went to the office where they doctored me. They took some dirt out of my eye with a stick with some cotton wrapped up around it. This was at the Blue Bell Mine. The next day they sent me to the hospital at Humboldt. I was discharged from the hospital July 18.

I am forty-three years old. I have never been sick during the last eight or ten years. There was nothing wrong with my eyes before I was hurt on June 13th at the Blue Bell Mine. I could see perfectly. I was struck right in the middle of the left eye. It interfered with my vision and caused me pain. Now I have a cloud in the eye and it has been that way ever since I was hurt at Blue Bell. I cannot see out of that eye. It is clouded. All I can see is cloudy. The loss of vision interfered with my work. I paid hospital fees of 1.50 a month, which were deducted from my wages.

Cross-examination by Mr. ANDERSON.

(Page 15—Transcript of Evidence.)

Since June 13th, 1923, I have been working for

(Testimony of Francisco Gomez.)

the [29] United Verde Copper Company at Clarkdale. I have been blasting chutes. The second time I have been working there since May 21, 1924. The first time I went to work there, September 5, 1923. I was injured in June, 1923, and went to work for the United Verde Copper Company in September following. I received full wages all of the time I was at Clarkdale. The first time, $3.63, the second time $3.85. I lost some time over there on account of my eye.

Before I went to work on May 22, I was examined by the doctor of the United Verde Copper Company. I told them that I had good sight. I did not tell them I could see absolutely normal out of the left eye. I was examined by the doctor of the United Verde Copper Company and was passed and put to work. The doctor gave me a card like the one you show me and I took the card down to the Company office and went to work. I have been working for them up until last Saturday drawing the regular wages of $3.85 a day.

Mr. ANDERSON.—Q. Did the doctor give you certain cards to read with one eye and then the other when you were examined to go to work for the Copper Company?

Mr. JENNINGS.—Objected to as a privileged communication between doctor and patient.

The objection was overruled and EXCEPTION asked for and allowed. (Page 18, Transcript of Evidence.)

(Testimony of Francisco Gomez.)

WITNESS.—He gave me some little black balls like that (indicating). There were some black dots on the wall and I had to count them. I did not tell them I was an able-bodied man because they did not ask me. They took my clothes off and examined me all over before they gave me the card to go to work, and I have been working ever since.

I did say that I never had any trouble with my left eye [30] before June 13, 1923. I had it hurt before; yes, sir. I don't recall if it was in May of 1919, but I remember that some oil got in my eye. I don't recollect that in May, 1922, I claimed that a piece of rock hit me in the eye. I told Dr. Vivian, who was in charge of the hospital at that time that the piece of rock hit me in the left eye. I was in the hospital, but it was oil with dirt in it, not a rock, metal dirt. I received compensation for the injuries. It was not the left eye, it was both eyes at that time. I was working at the Blue Bell Mine in May, 1919. I was hurt June 13, 1923, and went down to the hospital, where Dr. Franklin treated me. There was a nurse there at the time.

I did not work from the 13th of June until the 5th of September, and never worked at Blue Bell any more. The rock was about an inch and one-half or something like that. I do not know how much got into my eye because I shut it as soon as I received the lick. My partner cleaned my eye a little on the outside. His name is Francisco Lopez. I have talked with him about the case and I have talked with my lawyers.

(Testimony of Francisco Gomez.)

Yes, I said that Dr. Franklin took some dirt out of my eye at the hospital and there was a nurse with him at the time he examined my eye.

No, I cannot see as well now as I could on June 1, 1923. I have not had sore eyes during the last two or three years. I reported several times to the first aid station at Blue Bell when dirt fell in my eye.

I did not talk with Mr. Swiney. I reported that my eye was hurt to Mr. Davis, Mr. Bagley, and the Surveyor. I did not go back to Blue Bell to work as a mucker from August, 1923, to January, 1924, and never went back to work at the Blue Bell again. My shift boss was Swiney. At the time I was a miner [31] Lopez was a miner and there were several muckers but they were not there at the time.

Since I left the Blue Bell, in addition to working at the United Verde Copper Company, I worked twenty-six days at the Copper Chief as a mucker. My pay was 5.00.

I know Dr. Vivian; he is the doctor that looked after my eyes in May, 1919, and operated. It was my two eyes, both the right one and the left one.

Redirect Examination by Mr. JENNINGS.

After Dr. Vivian treated my eyes in 1919, they got all right. I could see just the same as if I never had anything happen to my eyes. Oil splashed into both eyes from a machine. It is the duty of the miner or machine man to bar down the roof after the blast.

(Testimony of Francisco Gomez.)

Recross-examination by Mr. ANDERSON.

Mr. Anderson handed the witness a card marked for identification as Defendant's Exhibit No. 1.

WITNESS.—I don't know whether this is the same card that the doctor at the United Verde Copper Company gave me after he examined me. I do not know whether it is my mark on the back, "I can't say it ain't." I worked at the mill. It is on top of the ground.

TESTIMONY OF FRANCISCO LOPEZ, FOR PLAINTIFF.

FRANCISCO LOPEZ, being called as a witness on behalf of the plaintiff and first duly sworn, through Interpreter, Gregorio B. Ruiz, testified as follows:

Direct Examination by Mr. JENNINGS.

(Page 33, of Transcript of Evidence.)

My name is Francisco Lopez. I live at Clemenceau, Arizona, where I work at the smelter. I have known the plaintiff three or four years. I have been employed at the Blue Bell [32] Mine. I first knew the plaintiff at the Blue Bell Mine in 1918 or 1919. At that time I worked there four months.

I was working at the Blue Bell Mine in June, 1923. On June 13, 1923, I was working on the 1200 foot level in Stope No. 40. The plaintiff here was working there with me. I was a miner. It was our duty to scrape the ceiling, so that when the

(Testimony of Francisco Lopez.) .
muckers would come in, or other workmen, nothing would fall on them. We would also blast. We came on shift at 7:30 and went off at 3:30 in the morning. The plaintiff blasted at a half of the shift. I did not. After the blast the plaintiff took a bar and scraped the ceiling up above and a piece of rock hit him in the eye. I was holding the light so he could scrape the ceiling. From where we were standing to the floor was about thirty feet. When the rock hit him in the eye he said, "I hurt myself. The rock struck me in the eye." I saw the rock strike him and immediately I took dirt away from his eye there and his eye was red. I did not take any dirt from the inside of the eye. I just cleaned the outside of the eye. Gomez then went down to the level—that was about 1:30 in the morning. He did not come back to work again and I next saw him in the station as we were going off shift. When we got to the top I went home and he went to see the foreman.

Cross-examination by Mr. ANDERSON.
(Page 37 of Transcript of Evidence.)

Gomez and I are friends. I met him at Blue Bell and over at the Smelter at Clemenceau. We talked the case over because he told me I would have to be a witness. I have no interest in the case. I did not take any dirt out of his eye. I wiped the outside of his eye because I did not want to bother the inside of the eye. It was watering. His eye was red at the time I saw it and there was lots of water

(Testimony of Francisco Lopez.)
coming out of the [33] eye. It was red the minute that I saw him. It was red immediately. I saw the eye within one minute after it was hurt. It was red and water coming out of it. Before that time I had seen his eye and saw that he could see all right. The orders were that if a man was injured he should go to the first aid station immediately. They treated them there whether they were diseased or injured. Gomez quit work as soon as he was hurt. I continued working. At the time Gomez was hurt, he and I were there alone—the others were down at the level eating their supper.

(Thereupon, because of the absence of the plaintiff's medical witness, it was stipulated that the defendant should proceed to put in evidence, reserving to the defendant the right to make any motions required at the close of the plaintiff's case.)

DEFENDANT'S EVIDENCE.

(Page 43 of Transcript of Evidence.)

TESTIMONY OF DOCTOR ROBERT T. FRANKLIN, FOR DEFENDANT.

DR. ROBERT T. FRANKLIN, a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is Robert T. Franklin. I am a regularly licensed and practicing physician and surgeon in Arizona. I was employed as a physician by the Southwest Metals Company from June 1, 1922, until

(Testimony of Doctor Robert T. Franklin.)
February, 1924. I have seen the plaintiff around the mine and at the hospital. I have a record of treating him in June, 1923.

Questions on the *voir dire* by Mr. JENNINGS.

I was regularly employed by the Southwest Metals Company at the time I treated Gomez, and it was in the regular course of my medical employment that I treated him. All of [34] the employees of the company paid $1.50 a month for hospital fees.

WITNESS.—I recall treating this plaintiff in June, 1923. I have a record of the treatment.

Mr. Jennings objected to any other evidence, claiming the privilege of the relation of physician and patient. The objection was sustained.

Mr. ANDERSON.—Q. You heard his testimony here while he was on the stand, stating that he came to the hospital where you were? A. Yes, sir.

Q. And you heard him state that you took some dirt out of his eye?

Now, I ask you, Doctor, did you or did you not remove any dirt from his eye on that occasion?

Objections by Mr. Jennings on the ground of relation of physician and patient.

Mr. ANDERSON.—If the Court please, that is not privileged. That is a statement of fact as to what the doctor did. Now, I am not asking him as to any treatment he made of anything that he did. The patient discloses and makes a statement of what the doctor did. Now, I have a right to ask him whether or not he did that particular thing or not.

(Testimony of Doctor Robert T. Franklin.)

The COURT.—There might be some exceptions, and there are some exceptions, but this you will note is calling for a statement from this physician as to what he discovered by his examination of the patient, and using that for the purpose of impeachment.

Mr. ANDERSON.—Well, if that is the way my question was asked I will withdraw my question.

The COURT.—Yes, that is the effect of the question. The objection is sustained. Exception allowed.

TESTIMONY OF DOCTOR CHARLES S. VIVIAN, FOR DEFENDANT.

Dr. CHARLES S. VIVIAN, a witness on behalf of the defendant, and first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 47 of Transcript of Evidence.)

My name is Charles S. Vivian. I am a physician and [35] surgeon. I am a regularly licensed and practicing physician in Arizona. I was formerly associated with the Consolidated Smelting Company, the predecessor of the Southwest Metals Company. I know the plaintiff, Francisco Gomez. Refreshing my recollection from record, I know that I treated the plaintiff in May of 1919.

Mr. ANDERSON.—We admit that the relation of patient and physician existed at that time; that

(Testimony of Doctor Charles S. Vivian.)

he was in the same position occupied by Dr. Franklin later.

Mr. JENNINGS objected on the ground that the relation of patient and physician existing between the witness and the plaintiff. The objection was sustained.

Mr. ANDERSON.—I want to ask the same question, your Honor, that I did of the other doctor.

Q. Did you treat both of his eyes at that time?

Mr. JENNINGS.—Same objections.

Mr. ANDERSON.—I ask it not to violate the privilege but in contradiction of the statement made by the plaintiff.

Objection sustained. An EXCEPTION requested and granted. (Page 48, Transcript of Evidence.)

TESTIMONY OF DOCTOR ROBERT C. BUCK, FOR DEFENDANT.

Dr. ROBERT C. BUCK, being called as a witness on behalf of the defendant and first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 49, of Transcript of Evidence.)

My name is Robert C. Buck. I am a regularly licensed and practicing physician in the State of Arizona. I am, at the present time, associated with the United States Veterans Bureau, specializing in eye, ear, nose and throat. I have examined the plaintiff. I am not employed by either the South-

(Testimony of Doctor Robert C. Buck.)
west Metals Company or the plaintiff. I examined plaintiff's eyes on July [36] 5th, of this year. I have made a specialty of the eye about twelve or thirteen years. From my examination of plaintiff's left eye and from my professional experience, I think I can express an opinion as to the cause of the condition that now exists in that eye.

Mr. JENNINGS then objected to the opinion of the witness if based upon any history of the case, received from anyone else.

WITNESS.—I think that I can state my opinion without taking into consideration the history of the case, basing my opinion solely on my examination. There is an opacity in the cornea of the left eye, which appears to me to be in the body of the cornea and such opacities come from a disease that we call interstitial ceratitis, which is practically always due to a specific infection. This is not evidence of an internal injury, but is an inflammatory condition in the substance of the cornea from this disease.

No evidence of an outside injury appeared to me. I examined that opacity very carefully, and it did not look to me like a superficial scar. The surface of the cornea was smooth and, so far as I could see, no irregularities in it. I threw a tiny spot of light on the cornea and moved it about over the cornea and, if that had struck an irregular part of the surface of the cornea, the form of the light would have been destroyed by the irregularity in the cornea but it was the same over the opacity and over the rest of the cornea. If there had been a cut on the outer

(Testimony of Doctor Robert C. Buck.)

part of the eye, a scar would have been left there and I would have seen it. The condition I found was in the body of the cornea below the surface and probably occasioned by syphilis, as it usually is—practically always in those cases. [37]

I had a history in connection with this case. I secured it from the Wasserman test. I saw the blood taken. The test was made under my direction and by my order. I was not present when the test was made, but the test was made under my order and by my direction, and I received the result of the analysis.

Q. What was the result of the analysis?

Question objected to.

Objection sustained. An EXCEPTION was requested and granted. (Page 56, Transcript of Evidence.)

The only evidence of any external injury that I found was a tiny spot on the lower lid, perhaps a little scar, not noticeable at all. Well, all I can say is that the condition at present is an opacity in the cornea. That opacity appears to me to be interstitial—not on the surface of the cornea—and, therefore, due to an interstitial ceratitis inflammation of the cornea—an inflammation of the parenchyma or body of the cornea rather than a scar from an external injury to the cornea and those cases of interstitial ceratitis are practically always, I believe, due to syphilis, either inherited or acquired.

The blood test was made by Dean Culp, the laboratory technician, out at the hospital. The

(Testimony of Doctor Robert C. Buck.)
Wasserman test is a blood test for syphilis—the various degrees of the test are the negative, where there is no syphilis, but they have two plus, three plus and four plus; and sometimes we get a report back—four plus strongly positive. Sometimes if we get two plus you would not be absolutely sure there was syphilis, but if it is four plus, we feel pretty sure that it is syphilis. If it is four plus, strongly positive, we feel a little more certain. If we get a negative, the rule is to take either one or two more tests, or test the spinal fluid. [38]

Cross-examination by Mr. JENNINGS.
(Page 60, of Transcript of Evidence.)

(Witness goes to blackboard and draws picture of eye.) This would be the iris and this the pupil. It is understood, of course, that the pupil is simply the opening through the iris and, while it looks black to us, it is because we are looking into a dark chamber. Now, the scar would come about like this (drawing) about the same size as a normal pupil—this pupil is about the same size as the normal pupil, only a little below the center, so that there is a crescent behind the top of the opacity. A scar is an opacity but an opacity may not be a scar. In this case, I should call it an opacity; it has the effect of the patient looking through something slightly cloudy—perhaps, slightly cloudy glass. The opacity is a very light gray — bluish gray. In some cases it may be thicker than others. If it becomes thick enough, then the patient will hardly be able to see thru it

(Testimony of Doctor Robert C. Buck.)

at all. If there is an injury to the eye, it will absorb the same as a scar on the hand. If it was a severe injury, you would not get the absorption that you would, I think, from ceratitis. The scar is not on the outside of the cornea, not on the inside of the cornea, but in the body of the cornea itself. To determine whether or not there is a scar on the outside of the cornea. It takes very careful examination—very close examination and possibly sometimes you could not tell definitely but, by passing that spot of light over the cornea, as we did this man, and getting no change in the refraction of the light—no distortion in that little beam of light, makes me feel that it is in the body of the cornea rather than on the surface. The opacity is caused by the infiltration of the tissue of the cornea. Infiltration means there is an irritation there that causes the blood to come in the blood cells and blood [39] serum and there is cloudyness takes place from that condition. There might possibly be a condition similar to pus. We don't usually get actual pus in interstitial ceratitis. It is not the breaking of the blood vessels, but it is more of an proliferation of the blood vessels in the diseased part. I don't know how many cases of interstitial ceratitis in the past twelve years I have treated. I have read a number of authorities on the diseases of the eye. A true interstitial ceratitis, I believe, is, in the majority of cases, due to syphilis.

The condition of the plaintiff's eye appears to me to be an opacity that would result from an inter-

(Testimony of Doctor Robert C. Buck.)
stitial ceratitis. It looks more like that to me than a superficial scar or scar from superficial ulcer.

Using the Snelling test card, the standard test card, with the patient sitting twenty feet from it—with the right eye read 20/20, which is normal, and with the left eye, he read 20/100. That is he saw at twenty feet what he should have seen at one hundred. I do not know whether 22/100 is occupational blindness. I do not think there will be much change in the condition of the plaintiff's eye in the future.

The Wasserman test is not considered by all authorities as an infallible test. If I got a strong four plus positive, the first time, I should certainly go ahead and treat the patient for syphilitic condition without waiting for any other test. After getting a strong four plus, I don't believe I would make a test of the spinal fluid.

Redirect Examination by Mr. ANDERSON.
(Page 71, of Transcript of Evidence.)

I don't think there is any treatment in the eye indicated now. There is an opacity there which I do not think anything will effect in the way of treatment. [40]

TESTIMONY OF MRS. TESSIE M. BENEDICT, FOR DEFENDANT.

My name is Tessie M. Benedict; I am nurse. I was working for the Southwest Metals Company in June, 1923. I was working under the supervision

(Testimony of Mrs. Tessie M. Benedict.)

of Dr. Franklin. I recall the plaintiff, and I assisted in treating him when he was in the hospital in June, 1923. I was acting under the direction of Dr. Franklin while I was working at the hospital. I was his assistant.

Question by Mr. ANDERSON.—Do you recall what treatment was made of his eye at that time?

Mr. JENNINGS.—Now, just a moment; I object.

Mr. ANDERSON.—I will admit that she was a nurse at the hospital of the defendant company, acting through and by and under the orders of the physician in charge of the company, and that the relation of physician and patient existed between Dr. Franklin, but that she is simply a nurse and not a professional—not a physician or surgeon.

Mr. JENNINGS.—I object to it on the ground that the communication or information she gained at any examination, or by seeing the plaintiff there is privileged on the ground that she is the agent of the doctor, and certainly an agent cannot make disclosures of the physician's records that he could not make himself. He is asking for what treatment was given.

The COURT.—The question is now—what treatment was given?

Mr. JENNINGS.—Yes, sir.

The COURT.—That is calling for treatment by the physician?

Mr. JENNINGS.—Yes.

The COURT.—The objection is sustained.

Mr. ANDERSON.—Upon the ground may I inquire—

Mr. JENNINGS.—I objected to it on the ground that it was a privileged communication.

The COURT.—The record shows that this lady is or was the assistant to the physician.

Mr. ANDERSON.—She was a trained nurse.

The COURT.—Trained nurse regularly employed in the hospital, and assisting the physiciaan, and under his direction, and she is called to testify as to the treatment by the physician? Objection is sustained.

Mr. ANDERSON.—I offer to prove by her what treatment was made, and her observations, and what she knows independent of the physician by reason of her capacity as a nurse. My contention is not within the statute, and may I have an exception?

The COURT.—Yes. [41]

RESUMPTION OF DEFENDANT'S CASE.

TESTIMONY OF DR. EDWIN C. BAKES, FOR DEFENDANT.

Dr. EDWIN C. BAKES, a witness for the defendant, being first duly sworn, testifies as follows:

Direct Examination by Mr. JENNINGS.
(Page 76, Transcript of Evidence.)

My name is Edwin C. Bakes. I reside in Phoenix, Arizona. I am a physician and surgeon. I have practiced since 1909. I have specialized in eye, ear, nose and throat, since 1913, at Phoenix.

(Testimony of Doctor Edwin C. Bakes.)

I have examined the plaintiff, Francisco Gomez; my first examination was July 23, 1923. The last examination was August 4, 1924. I made an eye examination. I found a corneal scar on the center of the cornea, of the left eye, almost completely filling the pupilary area. I discovered this on my first examination, July 23, 1923. From my examination the scar was not over six months old, I would say. I determined that the scar was recent, from the appearances of the scar itself, in that when a scar is recent, the edges of it are thinned out and feathered, so there isn't the abrupt leaving off of the scar into the normal tissue. The line of demarcation is thinned or feathered. When the scar becomes old, that line becomes very marked. There is a distinct beginning of scar and ending of corneal tissue—clear corneal tissue. It indicates that there had been a sore or ulcer on the cornea. The scar was on the outside surface of the cornea. This was apparent in my examination on July 23, 1923. I was able to tell by oblique illumination and viewing the cornea from the side. You could see normal corneal tissues underneath the scar that shows on the surface. Corneal ulcers are caused by infection, and corneal injury followed by infection. If a small piece of rock struck a [42] person in the eye that would be sufficient cause for a corneal ulcer. Any scratch or injury to the cornea may be followed by a corneal ulcer.

(The witness went to the blackboard to the draw-

(Testimony of Doctor Edwin C. Bakes.)

ing made thereon by Dr. Buck and stated as follows:)

This ring around here fairly accurately represents the limits of the corneal scar. It would be better represented if this was widened a little, so that it will show the effect of the scar. That scar is white like the illustration here and, of course, being more or less opaque, prevents the light or image entering the eye. That is the way it effects the vision.

From the test I made of the vision of his left eye I found it was 20/100. I discovered this at both my first and second examinations. The condition is permanent.

Q. Do you know what the term occupation or industrial blindness is? A. Yes, sir.

Q. What is the term?

Mr. ANDERSON.—Object to. It is immaterial and irrelevant.

The COURT.—Objection is overruled.

Mr. ANDERSON.—There is nothing in the pleadings, your Honor—no issue as to industrial blindness. There is total blindness alleged here. There is nothing in our statute that talks about industrial blindness or occupational blindness.

The COURT.—Proceed.

An EXCEPTION was requested and allowed. (Page 82, Transcript of Evidence.)

WITNESS.—It is considered that vision less than 20/70 constitutes occupational blindness. This is a condition in which the individual who has a total

(Testimony of Doctor Edwin C. Bakes.)
blindness of 20/70 is incapacitated [43] in a great many ways, as far as work is concerned, that is, doing accurate work—that is, if a person has only 20/70 vision. In both eyes he would be occupationally blind. The plaintiff is occupationally blind in the left eye.

Interstitial ceratitis is a disease of the substance of the cornea. It affects practically the whole of the cornea and occurs early in life, usually before the fifteenth year and is due to inherited syphilis. I have observed many cases of it. I have never seen a case of interstitial ceratitis in an adult as the result of acquired syphilis, and I have seen in my experience thousands of cases of acquired syphilis.

Interstitial ceratitis would not produce a cornea ulcer on the surface of the cornea. It is my opinion that the condition of plaintiff's eye was due to a corneal ulcer, produced from external causes.

Cross-examination by Mr. ANDERSON.
(Page 83, Transcript of Evidence.)

I was employed to appear here by the plaintiff's attorney.

Q. You make it a habit of appearing for the plaintiff in these personal cases.

Objected to as immaterial.

Mr. ANDERSON.—I want to show the interest of the witness, your Honor.

Objection sustained. EXCEPTION requested and allowed. (Page 84, Transcript of Evidence.)

WITNESS.—I have never made a Wasserman

(Testimony of Doctor Edwin C. Bakes.)
test of the plaintiff. I did not make an examination of him or make any observation for syphilis. Interstitial ceratitis is produced entirely from inherited syphilis. All of the books on eye diseases will tell you that interstitial ceratitis is an inherited syphilis disease. [44]

Even though I found the condition which I did in the plaintiff's eye on August 4th, and had taken a Wasserman test which showed four plus positive, I would know that his condition was not due to syphilis. Syphilis had absolutely nothing to do with it. His condition is an ulcerative ceratitis. Even though there was no abrasion from the outside, I would think that he had an ulcerative ceratitis just the same. This would come from the outside.

In speaking of occupational blindness, I referred to ordinary labor. I think plaintiff could work with the vision in his right eye although his judgment of distances and things of that sort, with the low vision of his left eye, would not be very accurate.

The condition which I found in the plaintiff's eye was all of recent origin—within six months of the time of my examination. It had no connection with an injury plaintiff received in 1919. There was some evidence of a ptergyium having been done. This refers to a growth at the inner angle of the eye. If I remember correctly, it appeared in both eyes. I do not know when this was done. I was only interested in the corneal scar. I think that the

(Testimony of Doctor Edwin C. Bäkes.)
cases of a patient having interstitial ceratitis on account of acquired syphilis, would be very, very rare. I have never seen one.

The scar which I found, when he is in ordinary light practically covers his entire pupil area. Probably two or three millimeters. It is practically round in contour. I cannot say what caused the ulcer, but it was not occasioned by syphilis—I am absolutely sure of that. It could have been the result of gonorrheal infection of the eye. If there had been no infection, the scratch upon the eye would not have left any effect, or practically none. [45]

After a cut the eye would probably become inflamed within twelve to twenty-four hours, depending entirely upon the magnitude of the cut. The redness would not come with the injury—it would take a few minutes at least for it to become red. A small scratch would cause very little congestion within a reasonable time.

Redirect Examination by Mr. JENNINGS.

(Page 96, Transcript of Evidence.)

In an interstitial ceratitis, you find the cornea, practically all of it, very hazy. When you examine it closely, you will find little areas where the haziness is more pronounced than others. Ordinarily, it is not in one spot, but in the whole eye, and both eyes are affected. Under ground, ordinarily, the cause of infection is pneumococcus.

(Testimony of Doctor Edwin C. Bake

Redirect Examination by Mr. JENNINGS.

(Page 98 of Transcript of Evidence.)

If a man were struck in the eye with a rock, it would be red within a very short time. Immediately would be probably too soon, but within the next few minutes he would have a redness of the eye.

Thereupon the plaintiff rests with the stipulation that the mortality tables may be introduced.

Mr. ANDERSON.—If the Court please, I desire to preserve my record upon the question that I annoyed your Honor with yesterday and I move at this time for a directed verdict upon the grounds set forth in my demurrer and for the grounds set forth in the objection that I made to the introduction of any evidence yesterday and I make the same a part of this motion and upon the further ground that there is no evidence tending to prove the allegations of the complaint, as this cause has finally gone to trial and that there is a variance between the allegations and [46] the proof in support of it and ask that the—

The COURT.—You refer to the total loss of vision?

Mr. ANDERSON.—No, I refer to the fact that there is no proof of subsequent infection—that the infection has caused the injury complained of.

The COURT.—Well, the motion is denied.

Mr. ANDERSON.—Note the exception. (Page 102, Transcript of Evidence.) I don't know whether I noted the exception yesterday, your Honor, to the ruling of the Court in the proferred

(Testimony of Doctor Charles S. Vivian.)
testimony of the nurse. If I did not, I would like to reserve an exception upon that ruling.

The COURT.—Yes, very well.

DEFENDANT'S CASE RESUMED.

TESTIMONY OF DOCTOR CHARLES S. VIVIAN, FOR DEFENDANT (CONTINUED).

Direct Examination by Mr. ANDERSON.
(Page 103, Transcript of Evidence.)

I operated upon the plaintiff sometime about May 8, 1919.

Q. Now, Doctor, you may state what operations you performed upon his eyes, if you can recall. If you have any record of it, you may refresh your recollection as to that.

Objected to on the ground of the relation of physician and patient. Objection sustained. Witness was excused to be recalled later.

TESTIMONY OF DEAN HARDEE CULP, FOR DEFENDANT.

DEAN HARDEE CULP, a witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.
(Page 105, Transcript of Evidence.)

My name is Culp. I am a laboratory technician. I have had three years university training and about nine years [47] practical experience. I am now located at Whipple Barracks, Veterans

(Testimony of Dean Hardee Culp.)

Bureau Hospital No. 50. I am acquainted with the Wasserman test and have performed it many times. I have performed many thousands of such tests. The Government is equipped to make this test at Whipple. I have charge of that equipment there. I have seen the plaintiff. I made blood tests of him in July, 1923, and July, 1924. We keep a record in a book of the tests made, showing the patient's name, the time and the result. My record of the first test shows that on July 16, 1923, Dr. Paul C. Christian requested a Wasserman test on F. Gomez.

Because of certain objections, Mr. Anderson said, "We will pass from that one just for the moment, if the Court please. We will get it in later, your Honor."

Refreshing my recollection from the record of the second examination, I find that it was made at the request of Doctor Robert Buck, on July 7, 1924. I took the blood myself. Dr. Buck was present. I was acting at his request. I took the sample of blood while he was there and made the test in the regular routine time. It takes quite a little time to do this. The blood is taken one day and the test is made the next. I reported the result of my test to Dr. Buck, and made a record of it at that time. I made the test at the request of Dr. Buck and for his information.

MR. JENNINGS' QUESTIONS ON VOIR DIRE.

The record is in my handwriting and made by myself. I am not a. regularly licensed physician.

(Testimony of Dean Hardee Culp.)
I have done laboratory work for nine years—that includes laboratory tests, not chemical. I had no assistance in this particular test; no one else handled the tubes—I did that myself and made the test myself. It was not passed on to anyone else for any treatment whatever of the blood. I gave this blood the regular treatment. I have [48] been at Whipple Barracks two years the first of last month; prior to that I was in the navy. There I did laboratory work. I made Wasserman tests there, reading them myself. After I took the blood, it was placed in a tube. I never studied medicine generally. I took a course in the university to qualify me to make these tests—that is my one job. My courses did not include a graduation degree. I attended the University of Pennsylvania. My practical experience has been under the direction of physicians and surgeons. I made other Wasserman tests at the same time that I made this one.

Direct Examination Resumed by Mr. ANDERSON.
(Page 112 of Transcript of Evidence.)

There were two tests, one with cholesterinized antigen and then an alcoholic antigen and the result in both was four plus strongly positive. Four plus, strongly positive, is ordinarily supposed to mean that the reaction is due to syphilis. It is the strongest reaction that we get. The various grades we have in the positive results are plus and minus and one plus, which are classed as doubtful tests. Two plus, three plus and four plus are classed as

Testimony of Dean Hardee Culp.)

ositives, four plus being the strongest reaction hat can be obtained.

I conveyed this information to Doctor Buck and ave the results of both of the tests that I made.

The test I made in July, 1923, for Doctor Chrisian was identically the same as the one I made or Doctor Buck. I made the two tests at that ime, or rather, one test including the two. At hat time the reaction was four plus—that indiates syphilis. The first test I made was July 16, 923.

Cross-examination by Mr. JENNINGS.

(Page 114, Transcript of Evidence.)

I made twelve other Wasserman tests the day I nade the [49] first examination. I made eight others at the time of the second examination. They were not all positive. The blood from the eight others was taken the same day. The blood from each individual was taken and placed in a tube; on each tube I placed the number and name of the patient. I did all this myself. The test was made the day after the blood was taken and the report made at that time. I am absolutely sure that the tubes did not get mixed up. I followed the same method of handling when I made the first test. It is not my place to prescribe any treatment for a patient. All I do is to make tests. There is no necessity of making a mistake—it is possible to make one there the same as anywhere else. When I made the second test, I did not merely go

(Testimony of Thomas S. Davey.)
on the previous record. I made the same careful test the second time as I did the first time.

TESTIMONY OF THOMAS S. DAVEY, FOR DEFENDANT.

THOMAS S. DAVEY, a witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.
(Page 117, Transcript of Evidence.)

My name is Thomas S. Davey. My business is mining. In June, 1923, I was employed by the Southwest Metals Company as mine superintendent of the Blue Bell Mine. I know the plaintiff. He was working at the Blue Bell Mine when I came there in December, 1922. In June, 1923, his foreman was William Swiney. The rules are that an injured man must immediately report to the shift boss, if possible, or the foreman. If he cannot find the foreman or shift boss then he must report to the engineer for relief at the surface. We had a first aid station at Blue Bell, of which I was in charge. We have men stationed in the room provided for that special purpose adjoining the change room and we [50] have an adjoining aid room in which we keep medicines for coughs and colds and such minor remedies. I recall that Gomez came there three or four times to have treatment for his eye previous to June, '23. At those times, I observed that Gomez was apparently suffering from weak eyes and acted and used his eyes as a

(Testimony of Thomas S. Davey.)

person does in coming from a dark room to a strong light, and always wore his hat over his eyes to evidently protect them from strong light; and his eyes showed a weak condition—that is, they were watery and showed general weakness. I gave him medicine prescribed by the doctor and left there for that purpose.

It is the duty of the mine foreman to check every man coming off shift and to take reports of all explosives and materials used on the shift. If a man were injured, he would report to the foreman. We would treat a man's eyes there for accident or otherwise.

I received no report of an accident to this man on June 13, 1923. I was there and he did not report to me. He did not come to me and say he was injured.

Cross-examination by Mr. JENNINGS.

(Page 121 of Transcript of Evidence.)

I sent the plaintiff to the hospital. He reported to me two or three days afterwards. This was two or three days after his last treatment at the first aid station. The last time I saw him his eyes were no different from the other previous occasions, that I could see. I sent him to the hospital because he asked to go. Usually the men come for first aid treatment had some dirt in their eyes. A man working under ground is liable to get something in their eyes and then they would come to the first aid station and we would wash it out and help them clean it up. As far as I know, this did not hap-

(Testimony of Thomas S. Davey.)

pen to the plaintiff. I washed his eye out, but there was no sand or dirt in his eye at that [51] time. His eye was inflamed when he went to the hospital, but not swollen that I could see. Both of his eyes were affected, but the left one, I believe, was inflamed a little more than the other. The plaintiff did not tell me that he was struck in the eye.

The shift boss is always at the top when the shift is over. Both the shift boss and the foreman are always there until all men have disappeared.

Redirect Examination by Mr. ANDERSON.

(Page 124, of Transcript of Evidence.)

The long bars given to miners to bar down rock above them are so long in order that they may reach forward and keep from being under the rock.

TESTIMONY OF WILLIAM SWINEY, FOR DEFENDANT.

Mr. SWINEY, a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 126, Transcript of Evidence.)

My name is William Swiney. I am a miner. I worked at the Blue Bell Mine in June, 1923. I am not working now. I have been a miner since 1881. The last time I worked at the Blue Bell for about nine months. Altogether I have worked there three or four years. I have known the plain-

(Testimony of William Swiney.)

tiff for eight or nine months. He worked for us about that long when I left there. I was his shift boss. He never reported to me any injury to his eyes. I did not observe his eyes particularly more than I have seen him wearing glasses all afternoons around town and around the Blue Bell Mine. When the men came off shift, it was my duty to check the report of explosives and timber and all accidents that occurred in the mine during the shift. He never reported any accident to me. I was always there when he went off shift. I was never absent [52] when they came off. I checked out all the men myself. We had a desk there for that business. If they have been injured or hurt or any trouble or anything wrong, they would report to me.

Cross-examination by Mr. JENNINGS.

It is the duty of the shift boss to see that men don't get hurt; to see that they are on time; to receive all reports of injuries; to check all explosive reports and timber that is used. I always go down to where the men are working and show them what to do. At any time during the shift that I go thru and see anything wrong, I call their attention to it. I checked the plaintiff out on the night of the 13th or 14th whatever it was. Plaintiff worked for me for two weeks. If any man did come off shift, I remembered him for I had a book there to check him off. I remember that night because he reported coming off shift. I am not testifying because it was my habit to be there,

(Testimony of William Swiney.)

but because it was compulsory for me to be there. I was never absent when a man came off shift. I remember June 13, 1923, because on the morning of the 16th I turned his card over to another boss. He was under my direction from the first to the 15th, but not from the 16th to the 31st. He was a very good workman. The only thing I noticed about his eyes was that in the afternoons, around the mine and up at the store, he was wearing glasses—that is not common around a mine.

TESTIMONY OF JOSEPH L. WHITE, FOR DEFENDANT.

JOSEPH L. WHITE, a witness for the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 131, of Transcript of Evidence.)

My name is Joseph L. White. I am a Mining Engineer. I am now the general Mine Superintendent for the Southwest Metals [53] Company. I first went to the Blue Bell Mine in 1914. I know the plaintiff, Gomez. I have known him since March, 1919. At that time I was Superintendent at Blue Bell. I have observed the plaintiff's eyes. The appearance of his eyes now are just about as I have always known them. I had occasion to know something about his eyes in 1919. I made a report concerning them at that time.

(The witness was handed a document marked for identification—Defendant's Exhibit No. 2—to refresh his recollection.)

(Testimony of Joseph L. White.)

WITNESS.—I don't know whether he reported to me personally but he reached me and I saw him at that time. I saw him and observed his eye. He reported that he had been struck in the left eye by a piece of rock. He was treated at the first aid station.

(Questions by Mr. JENNINGS.)

I have no independent recollection of these facts. I am testifying from the signed statement. It is signed by myself. The typewriting was done by Mr. H. E. Bagley, the clerk at the mine. I got the information from the injured party and know that the report was true at that time. I did not do the typewriting. I read it before I signed it. I am relying largely upon the memorandum. I am quite sure that the information is correct. I gathered the information from the man himself. You see, I speak some Spanish. Gomez does not speak English very much and I could carry on a conversation with him about matters underground.

Direct Examination Resumed by Mr. ANDERSON.

The plaintiff was sent to the hospital after having argyrol dropped in his eye. The card Marked Defendant's Exhibit No. 2 was made in the usual course of business and is a record [54] of the old Consolidated Arizona Smelting Company. That is my signature. It was made at that time and I knew it was correct and was filed as part of the accident that I had testified about.

(Defendant's Exhibit No. 2 was admitted and read by Mr. Anderson.)

(Testimony of Joseph L. White.)

Mr. ANDERSON.—Gentlemen, I will read you this,—

"Consolidated Arizona Smelting Co. File A550. Blue Bell Mine. May 8th, 1919. If accident involves serious or fatal injury telephone immediately to the Hospital and Safety Department, also when an inquest is to be held. Injured person's name: Franc. Gomez. Nationality: Mexican. About how old? 37 yrs. Occupation: Stoper Miner. Pay-roll No. 133. Daily wage? $4.65. Married or single: Married. Address: Blue Bell Mine. City or town: Mayer. State: Arizona. In whose service? Cons. Arizona Smelt Co.. General duties: Operation Stoper Machine. How long employed prior to accident? 1 yr. 6 mo. Experience: Had he performed similar work prior to this employment? Yes. Was he engaged in his regular occupation at the injury? Yes. Was the injured person familiar with the work engaged in, or the machine being operated at the time of the accident; state experience so far as known? Yes. Was he in full charge of machine, to what extent, could he start and stop at will? (Blank) Was the machine sound and in good working order at the time of the accident? (Blank) Last inspected? (Blank) Probable period of disability? (Blank) Nature and extent of injury? Piece of rock hit him in left eye. Name of attending Surgeon, if any attending? None.

(Testimony of Joseph L. White.)

First aid given, by whom? F. C. Hinman. Sent or taken to Hospital? Yes. Has he returned to work? Yes. If so, when? May 16th, 1919. Off 7 days only May 8th to 15th inclusive. Did the injured employee ever give notice of any defect in ways, works or apparatus connected with accident, and if so, was such defect remedied? (Blank) Did the injured person make any statement after the accident as to its cause, or admitting his carelessness, and if so, what did he say, and who heard his statement (Blank) The Accident. Date May 8th, 1919. Hour 2:30 A. M. Place: 1045 Stope. What light was there at the time and place of the accident? Carbide lamps. Name of the Foreman in charge, and what was he doing? Frank Chamis—Shift Boss. Names and addresses of all persons who witnessed the accident, or claim to have witnessed it, or who would probably know anything about it: (Blank) [55] Was the injury due to want of care on the part of the injured person, or negligence of any other person; if so, whom? (Blank) Explain how the accident happened, its cause, etc. If necessary illustrate by rough sketch: Hit in left eye by piece of flying rock. J. L. White, Superintendent."

Now look it over, if you desire, Gentlemen. (Handing Exhibit to jury.) You may ask him. Pardon me just a minute.

(Testimony of Joseph L. White.)

Previous to June 13, 1923, I don't know the exact dates, but I had seen him come to the first aid station on two different occasions to be treated at those times. He showed very plainly that his eyes were bothering him; he was squinting.

Cross-examination by Mr. JENNINGS.

(Page 138, of Transcript of Evidence.)

The report marked Defendant's Exhibit No. 2 was made by my conversation with the plaintiff. I had no interpreter. On May 8, 1919, he told me he was hit by a piece of flying rock.

(In answer to a question by a juror:)—In trying to get information from a Mexican, in my position, between motions and words, I can generally get the information desired in common ordinary work.

Recross-examination by Mr. JENNINGS.

(Page 140 of Transcript of Evidence.)

The difference in the statement—being struck in the eye with a piece of rock and having oil splashed in the eye might be very much the same, but I can distinguish between the words oil and rock.

Redirect Examination Continued by Mr. ANDERSON.

(Page 140, Transcript of Evidence.)

He claimed that he was injured in the left eye and he was sent to the hospital and treated for it in 1919.

TESTIMONY OF GEORGE H. ROSEVEARE, FOR DEFENDANT.

GEORGE H. ROSEVEARE, being called as a witness on [56] behalf of the defendant, and first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.
(Page 141, Transcript of Evidence.)

My name is George H. Roseveare. I live in Clarkdale. I am a crusherman, employed by the United Verde Copper Company. I am working in the crusher at Clarkdale I know the plaintiff, Gomez. I had known the plaintiff since he came to work there some time in the last of May, 1924. I have observed him in his work about the place. He came there first as a laborer and then asked to use powder which he was privileged to do. Whenever the chute plugs up he goes up there and shoots it. I have noticed his work around there and he is able to see and do the work he is employed to do. I have never noticed any difficulty.

TESTIMONY OF DOCTOR CHARLES W. VIVIAN, FOR DEFENDANT (CONTINUED).

Direct Examination by Mr. ANDERSON.
(Page 143 of Transcript of Evidence.)

I have made a special study of syphilis and kindred diseases. I am located at Phoenix. I am not employed by the Southwest Metals Company. I heard the testimony of Dr. Buck here yesterday

(Testimony of Doctor Charles W. Vivian.)

and I also heard the testimony of Mr. Culp as to the results of the Wasserman test. (Page 148, Transcript of Evidence.) I heard the testimony of Dr. Buck and of Mr. Culp.

Mr. ANDERSON.—Q. Now, assuming the facts stated by the doctor and Mr. Culp in their testimony to be true, can you, basing your evidence upon that assumption of those facts only, give your opinion as to what is the condition present in his eye?

A. Yes, sir.

I object to that question, if the Court please, on the ground that the witness cannot predicate or base his opinion upon the testimony heard in the courtroom for the reason it invades the province of the Court and the jury.

The COURT.—Well, I don't know that that objection covers it.

Mr. JENNINGS.—That is the testimony of —— ——.

The COURT.—The question is too indefinite. The objection is [57] sustained on the ground that this question is too indefinite, and not the proper method of examination, and an exception.

Mr. ANDERSON.—Was there an objection that it was too indefinite?

The COURT.—Yes, you may have an exception to the ruling. I ruled on it this morning and the ruling still stands.

TESTIMONY OF DR. E. A. GATTERDAM, FOR DEFENDANT.

Dr. E. A. GATTERDAM, a witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 150, Transcript of Evidence.)

My name is E. A. Gatterdam. I am a physician and surgeon, and a graduate of the University of Wisconsin and Rush Medical College. I have practiced my profession for seven years. I am now stationed at United States Veterans Hospital No. 50. I have been there approximately three years. I heard the testimony of Dr. Buck and Mr. Culp. Assuming the facts testified to be true, I can give my opinion as to what is the condition that exists in the plaintiff's eye.

Mr. ANDERSON.—Q. What, in your opinion, assuming the facts as stated by Dr. Buck to be true and the facts stated by Mr. Culp to be true, what is the condition—the cause of the condition that exists in his eye?

Mr. JENNINGS.—That is objected to on the ground that the question is too indefinite and because it invades the province of the Court and jury in asking for an opinion based upon other testimony or the opinions of other experts.

The objection is sustained and exception is requested and allowed. (Page 151, Transcript of Evidence.)

TESTIMONY OF DR. PAUL C. CHRISTIAN, FOR DEFENDANT.

Dr. PAUL C. CHRISTIAN, the witness for the defendant, being first duly sworn, testified as follows: [58]

Direct Examination by Mr. ANDERSON.

(Page 152, Transcript of Evidence.)

My name is Paul C. Christian, a physician and surgeon. I am a graduate of the University of Oklahoma. I have practiced my profession fifteen years. I am now stationed at Fort Whipple and I have specialized in syphilogy and urology. I have specialized in these subjects for ten years. My particular work at Fort Whipple is Assistant Surgeon in charge of the urological and syphilogical department. I first saw the plaintiff about June 18, 1923. I was preparing to relieve Dr. Franklin for a month at the Humboldt Hospital and went over there on 18th to acquaint myself with the work he expected me to do, and there came in contact with the patient. I took over the work for Dr. Franklin for the Southwest Metals Company. I observed the condition of the plaintiff's eye at that time and prescribed for it. The relation of physician and patient existed at that time. The condition of the plaintiff's eye was an iritis and interstitial ceratitis. In my opinion, it was due to syphilis. I gave mercury which caused it to clear up somewhat—that is a standard treatment for a syphilitic condition. I had a Wasserman test of his blood made at that

(Testimony of Dr. Paul C. Christian.)

time by Mr. Culp. The report that I received was four plus positive. I could not detect any evidence of any cut or scar on the exterior of the eye at that time. The date I reported to the hospital for actual duty was June 20, 1923. In my opinion, the sole cause of the condition in the plaintiff's eye at that time was chronic syphilis and interstitial ceratitis.

Cross-examination by Mr. JENNINGS.

(Page 154, Transcript of Evidence.)

I left there July 20, 1923. That is my signature. I think I delivered that instrument to the plaintiff. The instrument [59] was marked as Plaintiff's Exhibit No. 1 and admitted and read by Mr. Jennings. "Consolidated Arizona Smelting Company, Humboldt, Arizona. Blubell Department, dated July 9, 1923, ———, Foreman. Mr. Frances Gomez is discharged from the hospital this day, and able to return to duty having laid off for the following reasons: Injury to left eye, cornea ulcer. Date entered July 14; date discharged July 19. Dr. R. L. Franklin, per Dr. Christian."

Redirect Examination by Mr. ANDERSON.

(Page 155, Transcript of Evidence.)

Interstitial ceratitis is an ulcered condition on the inner side of the eye.

Those two sheets are the hospital's record of this patient. I have an independent recollection of the treatment given without the use of the record. The treatment given the patient was as follows: The room was shaded to protect the patient from the

(Testimony of Dr. Paul C. Christian.)

light and he was kept quietly in bed and was given mercury internally and mercury locally and his eye was kept bandaged to further shade it from the light and it was washed with argyrol once or twice a day and the pupil was kept dilated with atropin. I saw the plaintiff every day from June 20th until the date of his discharge—I believe the 18th or 19th. I have seen his eye since—it is my opinion that the sole cause of the present condition of his eye is syphilitic interstitial ceratitis.

Defendant rests.

Mr. JENNINGS.—According to the American Mortality Tables, forty-four years of age is 25.27 years.

PLAINTIFF'S EVIDENCE IN REBUTTAL.

TESTIMONY OF DR. EDWIN C. BAKES, FOR PLAINTIFF (IN REBUTTAL).

Direct examination by Mr. JENNINGS.

(Page 159, Transcript of Evidence.)

A corneal ulcer is on the outside of the eye produced by external causes.

Cross-examination by Mr. ANDERSON.

(Page 160, Transcript of Evidence.)

An ulser would not be produced by syphilis on the outside of the eye. It is not an ulcer unless it is on the [60] external surface.

Redirect Examination by Mr. JENNINGS.

(Page 160, Transcript of Evidence.)

There is no connection between a syphilitic con-

dition, if he has it, and the condition of his eye. The plaintiff rests.

Thereupon, the defendant renewed the motion for a directed verdict. The motion was overruled and an EXCEPTION was requested and allowed. (Page 175, Transcript of Evidence.)

(Argument of counsel to the jury.)

Thereupon the jury was instructed by the Court as to the law of the case.

The jury then retired and later returned into open court their written verdict, finding in favor of the plaintiff and assessing his damage at the sum of One Thousand ($1000.00) Dollars.

The foregoing bill of exceptions contains all of the evidence received upon the trial of this action or relating to the foregoing exceptions.

AND, WHEREAS, the matters and things above set forth do not duly appear of record, the defendant Southwest Metals Company presents its bill of exceptions in said cause, and prays that the same may be signed and sealed and made of record in this cause by this Honorable Court pursuant to the law in such cases.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

Approved:

——————————,
Attorneys for Plaintiff. [61]

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose and the same having been examined by me and found to be correct, the same is now, on this 25th day of October, 1924,duly signed, approved and allowed, and made a part of the record herein.

F. C. JACOBS,
Judge of the United States District Court.

[Endorsed]: Filed Oct. 4, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [62]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, October 13th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—OCTOBER 13, 1924—ORDER OVERRULING MOTION FOR NEW TRIAL.

Defendant's motion for a new trial is now argued, Whereupon, IT IS ORDERED BY THE COURT that the said motion is DENIED. [63]

In the District Court of the United States, in and for the District of Arizona.

No. L–151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

ORDER FIXING AMOUNT OF SUPERSEDEAS AND COST BOND.

Upon motion of defendant herein that the amount of the supersedeas and cost bond be fixed herein,—

IT IS ORDERED that such supersedeas and cost bond be fixed at the sum of One Thousand Five Hundred ($1,500.00) Dollars, and defendant be allowed thirty days in which to file said bond.

IT IS FURTHER ORDERED that no execution shall issue pending the filing of said supersedeas and cost bond.

Done in open court this 13th day of October, 1924.

F. C. JACOBS,
Judge.

[Endorsed]: Order Fixing Amount of Supersedeas and Cost Bond. Filed Oct. 14, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [64]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, October 16th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—OCTOBER 16, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 18, 1924, TO SETTLE BILL OF EXCEPTIONS.

Owing to the stress of court business, the Court having been unable to settle defendant's bill of exceptions within the time heretofore allowed,—

IT IS NOW ORDERED that time within which to settle said bill of exceptions be extended to and including Saturday, the 18th day of October, 1924. [65]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, October 18th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—OCTOBER 18, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 25, 1924, TO SETTLE BILL OF EXCEPTIONS.

Owing to continued stress of court business, the Judge being unable to settle the defendant's bill of exceptions herein within the time heretofore allowed,—

IT IS NOW ORDERED that further extension of time is hereby granted to and including Saturday,

the 25th day of October, 1924, to settle said bill of exceptions. [66]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, October 25th, 1924.)

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—OCTOBER 25, 1924—ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 1, 1924, TO SETTLE BILL OF EXCEPTIONS.

IT IS ORDERED that Attorneys Jennings & Strouse, counsel for the plaintiff, may withdraw from the file in this case the reporter's transcript of the evidence for one week.

IT IS FURTHER ORDERED that time for settling defendant's bill of exceptions is further extended to Saturday, November 1st, 1924. [67]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, November 1st, 1924.)

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—NOVEMBER 1, 1924—ORDER RE WITHDRAWAL OF BILL OF EXCEPTIONS.

IT IS ORDERED BY THE COURT that the proposed bill of exceptions filed herein be withdrawn for forwarding to the attorneys for the defendant, Southwest Metals Company, together with amendments proposed by the Court, to have the same engrossed. [68]

In the District Court of the United States, in and for the District of Arizona.

No. L–151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

The Southwest Metals Company, a corporation incorporated under the laws of the State of Delaware, and duly authorized to transact business in the State of Arizona, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered in accordance therewith on August 8th, 1924, and by the order of this Court entered October 13, 1924, overruling its motion for a new trial, comes now by Anderson, Gale & Nilsson, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided;

That in accordance with an order of this Court, dated October 13, 1924, this defendant has filed a supersedeas and cost bond in the sum of Fifteen Hundred Dollars ($1500.00).

WHEREFORE, defendant prays that an order be made that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, and that a transcript of the record, proceedings and documents upon which said verdict, judgment and order were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed Nov. 11, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [69]

In the District Court of the United States, in and for the District of Arizona.

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND STAY OF EXECUTION.

Upon motion of Messrs. Anderson, Gale & Nilsson, attorneys for the defendant, and upon filing a

petition for writ of error and supersedeas and cost bond in the sum of Fifteen Hundred Dollars ($1500.00) and assignment of errors, it is ordered that writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein; and

The supersedeas and cost bond having been filed herein, it is further ordered that all proceedings herein be suspended until the final determination of this writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, November 11th, 1924.

F. C. JACOBS,
District Judge.

[Endorsed]: Order Allowing Writ of Error and Stay of Execution. Filed Nov. 11, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [70]

In the District Court of the United States, in and for the District of Arizona.

No. L–151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

SUPERSEDEAS AND COST BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Southwest Metals Company, a corporation, of the State of Delaware, as principal, and the National Surety Company of New York, a corporation in the State of New York, as surety, are held and firmly bound unto Francesco Gomez in the sum of Fifteen Hundred Dollars ($1500.00), to be paid to said Francesco Gomez, for the payment of which well and truly to be made we bind ourselves, our successors or assigns jointly and severally by these presents.

Sealed with our seals this 27th day of October, A. D. 1924.

WHEREAS, lately at a session of the District Court of the United States for the District of Arizona, in a suit pending in said court wherein Francesco Gomez was plaintiff and the Southwest Metals Company was defendant, judgment was rendered against said defendant, Southwest Metals Company, in the sum of One Thousand Dollars ($1,000.00), and

WHEREAS, said defendant Southwest Metals Company filed a motion for a new trial which was overruled and denied, and

WHEREAS, said Southwest Metals Company is prosecuting a writ of error to the United States Court of Appeal for the Ninth Circuit, to review the judgment of the United States District Court, as aforesaid, and the whole thereof and the order

denying defendant's motion for a new trial, and it is [71] desirous of staying execution of said judgment until said writ of error shall have been perfected and determined,—

NOW, THEREFORE, the condition of this obligation is such that if the above Southwest Metals Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

SOUTHWEST METALS COMPANY,
Principal.
By O. F. JANSSEN,
Auditor.
NATIONAL SURETY COMPANY OF NEW YORK.
[Seal] By A. H. GALE,
Its Attorney in Fact.

Approved by F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 11th day of November, 1924.

F. C. JACOBS,
Judge.

[Endorsed]: Supersedeas and Cost Bond. Filed Nov. 11, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy. [72]

In the District Court of the United States, in and for the District of Arizona.

No. L–151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the Southwest Metals Company, a corporation duly organized under the laws of the State of Delaware and authorized to transact business in the State of Arizona, by Anderson, Gale & Nilsson, its attorneys, and in connection with its petition for a writ of error herein says:

That in the record and proceedings during the trial of the above-entitled cause and in said judgment in said District Court of Arizona, and in the order by said Court overruling defendant's motion for a new trial, error has intervened to its prejudice, and this defendant here makes the following assignments of errors upon which it will rely in the prosecution of the writ of error, in the above-entitled cause, to wit:

1. The United States District Court for the District of Arizona erred in overruling defendant's demurrer to the complaint.

2. The United States District Court for the District of Arizona erred in overruling defendant's objection to the introduction of any evidence made at the beginning of the trial.

3. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following questions, thereby excluding evidence offered by the defendant during the examination of Dr. Robert T. Franklin, on the ground that such evidence was privileged: [73]

> Q. You heard his testimony here while he was on the stand, stating that he came to the hospital where you were?
>
> A. Yes, sir.
>
> Q. And you heard him state that you took some dirt out of his eye?
>
> Q. Now, I ask you Doctor, did you or did you not remove any dirt from his eye on that occasion?

for the reason that said evidence was offered solely for the purpose of contradicting the testimony of the plaintiff that the doctor had removed dirt from his eye.

4. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during the examination of Doctor Charles S. Vivian on the ground that such evidence was privileged:

> Q. Did you treat both of his eyes at that time?

for the reason that said testimony was offered by the defendant solely for the purpose of contradicting a statement made by the plaintiff in his testimony that the doctor had treated both of his eyes.

5. The United States District Court for the District of Arizona erred in sustaining the objection to the testimony of Tessie M. Benedict, a nurse, on the ground that her testimony was privileged under Section 1677, sub-section 6, of the Revised Statutes of Arizona, 1913, Civil Code, for the reason that she was not a physician or surgeon, and, therefore, her testimony was not privileged.

6. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during the examination of Dr. Robert C. Buck, on the ground that such evidence was irrelevant and immaterial:

> Q. Were you appointed under the order of the Court to examine this man?

for the reason that said evidence was offered for the purpose of showing that the witness was an impartial and unbiased witness. [74]

7. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question on cross-examination, thereby excluding evidence sought to be brought out by the defendant during the cross-examination of Dr. Edwin C. Bakes, on the ground that it was immaterial:

> Q. You make it a habit of appearing for the plaintiff in these personal injury cases?

for the reason that the question was propounded to show the interest, bias and prejudice of the witness.

8. The United States District Court for the District of Arizona erred in admitting, over the objection of the defendant, the following testimony by Dr. Edwin C. Bakes:

> Q. Do you know what the term occupational or industrial blindness is? A. Yes, sir.
>
> Q. What is the term?
>
> A. It is considered that vision less than 20/70 constitutes occupational blindness. This is a condition in which the individual who has a total blindness of 20/70 is incapacitated in a great many ways, as far as work is concerned, that is, doing accurate work—that is, if the person has only 20/70 vision. In both eyes he would be occupationally blind. The plaintiff is occupationally blind in his left eye.

for the reason that industrial blindness was not an issue in the case and there was nothing in the pleadings concerning it.

9. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding testimony offered by the defendant during the examination of Dr. Charles W. Vivian:

> Q. Now, assuming the facts stated by the Doctor and Mr. Culp in their testimony to be true, can you, basing your evidence upon that

> assumption of those facts only, give your opinion as to what is the condition present in his eye? A. Yes, sir.

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the courtroom and was, therefore, the [75] same as though all of the evidence which the witness had heard in the courtroom had been repeated to him in the question.

10. The United States District Court for the District of Arizona erred in excluding the following testimony offered by the defendant during the examination of Dr. E. A. Gatterdam:

> Q. What in your opinion, assuming the facts as stated by Dr. Buck to be true and the facts as stated by Mr. Culp to be true, what is the condition—the cause of the condition that exists in his eye?

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the courtroom and was, therefore, the same as though all of the evidence which the witness had heard in the courtroom had been repeated to him in the question.

11. The United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a directed verdict at the close of all of the evidence.

12. The verdict of the jury is contrary to law.

13. The verdict is not supported by and is contrary to the evidence.

14. The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is contrary to law.

15. The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

16. The United States District Court for the District of Arizona erred in refusing to grant the defendant a new trial. [76]

WHEREFORE, said Southwest Metals Company, by reason of the errors aforesaid, prays that said judgment against it may be reversed, set aside and held for naught.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: *Order Allowing Writ of Error and Stay of Execution.* Filed Nov. 11, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [77]

In the District Court of the United States in and for the District of Arizona.

No. L-151—PRCT.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

WRIT OF ERROR.

The President of the United States to the Honorable Judge of the United States District Court, for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you between Francisco Gomez, plaintiff, and the Southwest Metals Company, a corporation, defendant, manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Ap-

peals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may [78] cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of November, 1924, and of the Independence of the United States the one hundred and forty-ninth.

[Seal] C. R. McFALL,
Clerk.
By M. R. Malcolm,
Deputy Clerk.

[Endorsed]: Writ of Error. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy. [79]

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, within mentioned, at the day and place within contained.

By the Court.

[Seal] C. R. McFALL,

Clerk U. S. District Court for the District of Arizona.

By M. R. Malcolm,

Deputy Clerk. [80]

In the District Court of the United States in and for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

The President of the United States to Francisco Gomez and Messrs. Jennings & Strouse and D. A. Fraser, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the Clerk's office of the District Court of the United

States for the District of Arizona, wherein the Southwest Metals Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the United States District Court for the District of Arizona, this 24th day of November, 1924, and of the Independence of the United States the one hundred and forty-ninth.

F. C. JACOBS,
United States District Judge.

[Endorsed]: Filed Nov. 29, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [81]

UNITED STATES MARSHAL'S OFFICE.

I hereby certify that I received the within writ on the 25th day of November, 1924, and personally served the same on the 25th day of November, 1924, at Phoenix, Ariz., by serving Jennings, Strouse and D. A. Fraser with a certified copy of this writ.

G. A. MAUK,
U. S. Marshal.
By T. E. Benton,
Deputy.

In the District Court of the United States in and for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon writ of error heretofore sued out by the Southwest Metals Company and included in said transcript, the following pleadings, proceedings and papers on file, to wit:

(1) Plaintiff's amended complaint.
(2) Defendant's demurrer and answer.
(3) The verdict.
(4) The judgment.
(5) All minute entries in this case.
(6) Bill of exceptions.
(7) All exhibits offered by the defendant whether admitted or refused.
(8) Motion for new trial.
(9) Orders extending time to prepare bill of exceptions.

(10) Order fixing amount of supersedeas and cost bond.
(11) Supersedeas and cost bond and approval.
(12) Petition for writ of error.
(13) Assignment of errors. [82]
(14) Order granting writ of error and stay of execution.
(15) Original writ of error.
(16) Original citation on writ of error.
(17) This praecipe.
(18) Clerk's certificate.

The said transcript to be filed with the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before the 24th day of December, 1924.

ANDERSON & GALE,
Attorneys for Defendant.

[Endorsed]: Praecipe for Transcript of Record. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [83]

In the District Court of the United States, in and for the District of Arizona.

No. L–151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona including the records, papers and files in the case of Francisco Gomez, plaintiff, versus Southwest Metals Company, a corporation, defendant, said case being numbered 151 (Prescott) on the Law docket of said court.

I further certify that the foregoing 83 pages, numbered from 1 to 83, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Thirty-eight & 10/100 Dollars ($38.10), has been paid to

me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court this 16th day of December, 1924.

[Seal] C. R. McFALL,

Clerk of the District Court of the United States, for the District of Arizona.

By M. R. Malcolm,

Deputy Clerk. [84]

[Endorsed]: No. 4445. United States Circuit Court of Appeals for the Ninth Circuit. Southwest Metals Company, a Corporation, Plaintiff in Error, vs. Francisco Gomez, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed December 24, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4445

6

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHWEST METALS COMPANY,
A Corporation,
Plaintiff in Error.

vs.

FRANCISCO GOMEZ,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

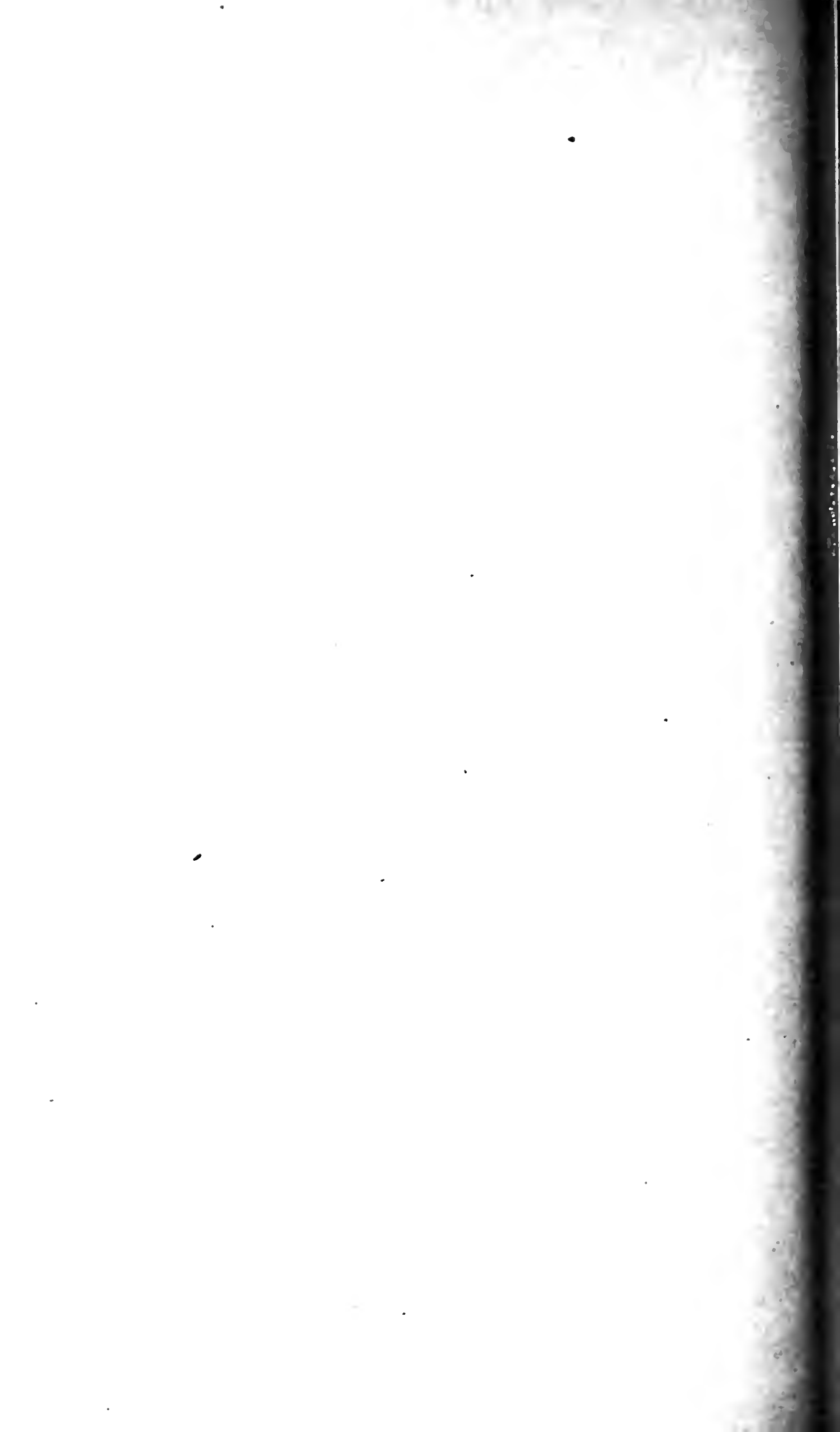
BRIEF OF PLAINTIFF IN ERROR

ANDERSON, GALE AND MILLER
Attorneys for Plaintiff in Error

Filed this........day of.................,1925

FRANK D. MONCKTON,
CLERK

By.........................
DEPUTY CLERK.



United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHWEST METALS COMPANY, A Corporation, Plaintiff in Error. vs. FRANCISCO GOMEZ, Defendant in Error.	No...........

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

Defendant in Error, Francisco Gomez, Plaintiff below and herein referred to as Plaintiff, brought suit against the Plaintiff in Error, Southwest Metals Company, a Corporation, Defendant below and herein referred to as Defendant, in the District Court of the United States for the District of Arizona, for an alleged injury to his left eye. Said action was a statutory one under the Arizona Employers' Liability Law, claiming damages in the sum of Ten Thousand Dollars. Gomez was employed by the Metals Company as a manual laborer, and claimed that he was injured by an

accident arising out of and in the course of his labor, and due to a condition of such occupation or employment. He alleged, (See Par. 3 of said Amended Complaint, Transcript of Record, Page 11 and 12):

> "That plaintiff sustained injuries in substantially the manner following:
>
> "The plaintiff on said date, was employed and at work, as a miner, in one of said defendant's mines, known as the Blue Bell mine, and on the 1200 ft. level thereof, in stope No. 40, and in the usual course of his employment was picking rock with a bar, when a small piece of rock, dust or debris dropped from the roof of said stope, striking the plaintiff in the left eye, injuring said left eye; *that as a result of said injury to said eye, and without fault on the part of this plaintiff, the said eye became infected, and the plaintiff's vision in his said left eye was permanently and totally destroyed;* that by reason thereof, the plaintiff has suffered great physical pain and has been disabled from following his usual occupation of a miner and manual laborer; all to his damage in the sum of Ten Thousand ($10,000.00) dollars;"

Plaintiff claimed that he was injured while working for the Metals Company; that he got a piece of rock in his eye; that his vision is ruined; that before this time he had perfect eye.

The defendant denied this and attempted to show that he was injured in his eye at a former time, and

attempted to show by the doctor who treated him at the former time, what the injury was, and attempted to show by the doctor that he had formerly operated on this eye.

Defendant also attempted to impeach the statements of Plaintiff that the doctor took some dirt out of his eye at the time of the alleged injury, by the doctor who plaintiff claimed performed this service. This the Court excluded as privileged.

Under the Arizona law, (Ariz. Session Laws, 1921, Chapter 131, which reads as follows:

> "Sec. 1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time, on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent and disinterested physician or physicians, surgeon, or surgeons, in order to qualify the person or persons making such examination, to testify in said cause as to the nature, extent, and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness."

At defendant's request Doctor Buck was appointed under this statute to examine the Plaintiff for the pur-

pose of testifying at the trial. The doctor testified as to the condition that he found in the eye, the cause of that condition. (See Transcript of Record, Pages 46-51.)

A nurse who was working for the Southwest Metals Company in its hospital under the supervision of their doctor was tendered by the Defendant. This nurse treated the plaintiff when he came to the hospital. Her testimony was excluded as within the Arizona statute of privileged communications, Civil Code 1913, Par. 1677, (6), which reads as follows:

> "*A Physician or Surgeon* cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

Defendant offered to prove by the nurse what treatment was given to the Plaintiff, and her observations of the eye, and what she knew independent of the physician by reason of her observations in the capacity of nurse. This the Court refused, and an exception was taken. (See Transcript of Record, Page 53.)

Plaintiff placed on the stand a doctor who had previously examined the Plaintiff and he described the

Plaintiff's injury. The doctor was then asked concerning occupational or industrial blindness, over the objection of the Defendant, because there was nothing in the pleadings, and no issue as to any industrial blindness, and no such terms are known to the Arizona law. (See Transcript of Record, Page 55.) The Court permitted the witness to so testify and to state that the Plaintiff was occupationally blind in his eye. Defendant undertook to show, on cross examination, that this doctor made a habit of appearing for plaintiffs in personal injury cases, in order to show his interest and bias. Plaintiff objected, and the Court sustained the objection, and an exception was taken by the Defendant.

The defendant moved for a directed verdict at the close of the Plaintiff's evidence and renewed this motion at the close of all the evidence. (See Transcript of Record, Pages 18-19; also pages 34 and 35; page 59; page 79.)

The Defendant offered Doctor Vivian to prove operation on Plaintiff's eye at a previous time, and to show condition of the same, in impeachment of the Plaintiff's statement that the eye was perfectly recovered from the said operation. This was refused on the ground of privilege. (See Transcript of Record Page 46; also Page 60.)

A witness, expert on Wassermann Tests, was introduced by the Defendant, who had made two tests of Plaintiff's blood, and the result showed very positive

syphilitic condition. (See Transcript of Record, Pages 60-63.)

Defendant also introduced evidence to show that plaintiff did not report any injury to his eye and that he delayed making such report; that infection was more liable by reason of the delay.

Defendant's theory of the case, based on the testimony of Doctor Buck and the Wassermann examination of the Plaintiff, was that there was no injury whatever to the eye; that its condition was the result of Interstitial Ceratitis, and that it was produced by the syphilis in the blood of the Plaintiff. The defendant tendered the testimony of Doctor Vivian and Doctor Gatterdam, and asked them for an expert opinion based upon the facts of Defendant's case assuming the testimony which they had heard in full, to be true. This the Court refused to allow, and exception was saved. (See Transcript of Record, Pages 73, 74, 75, testimony of Dr. Vivian and Dr. Gatterdam.)

The Plaintiff was then permitted on rebuttal to place Doctor Bakes on the stand and give evidence that there was no relation between a syphilitic condition and the condition of Plaintiff's eye. The jury returned a verdict of One Thousand Dollars.

The following Assignments of Error are relied upon:

ASSIGNMENT OF ERROR NO. 1

The United States District Court for the

District of Arizona erred in overruling defendant's demurrer to the Complaint.

ASSIGNMENT OF ERROR NO. II

The United States District Court for the District of Arizona erred in overruling the defendant's objection to the introduction of any evidence, made at the beginning of the trial.

ASSIGNMENT OF ERROR NO. III

The United States District Court for the District of Arizona erred in sustaining the objection of the Plaintiff to the following questions, thereby excluding evidence offered by the Defendant during the examination of Dr. Robert T. Frankklin, on the ground that such evidence was privileged:

Q. You heard his testimony here while he was on the stand, stating that he came to the hospital where you were?

A. Yes, sir.

Q. And you heard him state that you took some dirt out of his eye?

Q. Now, I ask you Doctor, did you or did you not remove any dirt from his eye on that occasion?

for the reason that said evidence was offered solely for the purpose of contradicting the testimony of the plaintiff that the doctor had removed dirt from his eye.

ASSIGNMENT OF ERROR NO. IV

The United States District Court for the District of Arizona erred in sustaining the

objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during the examination of Dr. Charles S. Vivian, on the ground that such evidence was privileged:

Q. Did you treat both of his eyes at that time?

for the reason that said testimony was offered by the defendant solely for the purpose of contradicting a statement made by the plaintiff in his testimony that the doctor had treated both of his eyes.

ASSIGNMENT OF ERROR NO. V

The United States District Court for the District of Arizona erred in sustaining the objection to the testimony of Tessie M. Benedict, a nurse, on the ground that her testimony was privileged under Section 1677, sub-section 6, of the Revised Statutes of Arizona, Civil Code, 1913, for the reason that she was not a physician or surgeon and, therefore, her testimony was not privileged.

ASSIGNMENT OF ERROR NO VI

The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during examination of Dr. Robert C. Buck, on the ground that such evidence was irrelevant and immaterial:

Q. Were you appointed under the order of the Court to examine this man?

for the reason that said evidence was offered for the purpose of showing that the witness was an impartial and unbiased witness.

ASSIGNMENT OF ERROR NO. VII

The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question on cross examination, thereby excluding evidence sought to be brought out by the defendant during the cross examination of Dr. Edwin C. Bakes, on the ground that it was immaterial:

Q. You make it a habit of appearing for plaintiff in these personal injury cases?

for the reason that the question was propounded to show the interest, bias and prejudice of the witness.

ASSIGNMENT OF ERROR NO VIII

The United States District Court for the District of Arizona erred in admitting, over the objection of the defendant, the following testimony by Dr. Edwin C. Bakes:

Q. Do you know what the term occupation or industrial blindness is?

A. Yes, sir?

Q. What is the term?

A. It is considered that vision less than 20/70 constitutes occupational blindness. This is a condition in which the individual who has a total blindness of 20/70 is incapacitated in a great many ways, as far as work is concerned, that is, doing accurate work—

that is, if the person has only 20/70 vision. In both eyes he would be occupationally blind. The plaintiff is occupationally blind in his left eye.

for the reason that industrial blindness was not an issue in the case and there was nothing in the pleadings concerning it.

ASSIGNMENT OF ERROR NO. IX

The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding testimony offered by the defendant during the examination of Dr. Charles W. Vivian:

Q. Now, assuming the facts stated by the doctor and Mr. Culp in their testimony to be true, can you, basing your evidence upon that assumption of those facts only, give your opinion as to what is the condition present in his eye?

A. Yes, sir.

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the court room, was, therefore, the same as though all of the evidence which the witness had heard in the court room had been repeated to him in the question.

ASSIGNMENT OF ERROR NO. X

The United States District Court for the

District of Arizona erred in excluding the following testimony offered by the defendant during the examination of Dr. E. A. Gatterdam:

Q. What in your opinion, assuming the facts as stated by Dr. Buck to be true and the facts as stated by Mr. Culp to be true, what is the condition—the cause of the condition that exists in his eye?

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the court room and was, therefore, the same as though all of the evidence which the witness had heard in the court room had been repeated to him in the question.

ASSIGNMENT OF ERROR NO. XI

The United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a direct verdict at the close of all of the evidence.

ASSIGNMENT OF ERROR NO. XII

The verdict of the jury is contrary to law.

ASSIGNMENT OF ERROR NO. XIII

The verdict is not supported by and is contrary to the evidence.

ASSIGNMENT OF ERROR NO. XIV

The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is contrary to law.

ASSIGNMENT OF ERROR NO. XV

The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

ASSIGNMENT OF ERROR NO. XVI

The United States District Court for the District of Arizona, erred in refusing to grant the defendant a new trial.

POINTS AND AUTHORITIES

(ASSIGNMENTS OF ERROR I, II, AND XI)

The Court erred in not granting Defendant's demurrer to the Complaint and in not sustaining Defendant's objection to the introduction of any evidence made at the first offer of any testimony. This embraces the first two Assignments of Error, and both will be treated together.

The Statute of Arizona, Paragraph 3158 Civil Code, also Paragraph 3154, Civil Code, provides liability without fault against employers of labor for certain hazardous occupations, and limits that liability to death or injury caused by any accident due to a condition of such occupation, with a proviso that the employer shall not be liable if the injury or death is caused by the negligence of the employee killed or injured. This Complaint charges that an accident caused a piece of rock to strike the Plaintiff in the left eye, thereby injuring said eye. It further charges,

> "that as a result of said injury to said eye and without fault on the part of this Plaintiff, the said eye became infected, and Plaintiff's vision in said left eye was permanently and totally destroyed."

First, there is no charge that the injury to the eye caused by the accident destroyed the vision in said eye, and (second), there is the positive allegation that the infection did cause the loss of the vision. The infection was charged to have resulted from the injury, but there is no allegation that the accident caused the infection; there is no allegation as to how the infection was caused, where it came from, whose fault it was, or anything of a positive nature except that it was without fault of the plaintiff. This, we contend, does not state a case within this law because there is no allegation that the accident caused the infection to the eye of which they complain. There is no allegation and there was no proof even tending to show that the infection resulted from the inherent risks or hazards of the occupation. There was no allegation and no evidence tending to prove that the accident in any way caused the infection. There was no allegation and no proof showing how the eye became infected,—simply a bare allegation that as a result of said injury the eye became infected. This being a statutory action, a liability against us without our fault, it must be reasonably construed and the allegations must be brought within the reasonable terms of the statute. If speculation is allowed, we can say that as a result of the in-

jury infection ensued; that as a result of the infection, it was transmitted to his family; that as a result of transmitting it to his family it was transmitted to the children, and on, and on, building one result upon another. We are liable under the statute for the *injury* caused by an accident due to a condition of his employment; the accident must be due to the inherent conditions of his occupation. The accident, if caused by other and outside conditions, does not make us liable. An accident, we repeat, must be due to the inherent conditions of the occupation, and said accident must have caused the injury complained of. Nothing more than this was contemplated in the statute. Occupational diseases, sanitary conditions, are not contemplated or taken into consideration in the law. The law does not provide a remedy for ordinary sickness or infections contracted while at work, or for any disease contracted while in our employ. The statute plainly limits liability to injury caused by accident due to a condition of the occupation. This question is very important to Defendant and others engaged in the hazardous occupation of mining within the State of Arizona. What is embraced within this Arizona Act, and to what things the accident is due, (inherent risks and hazards), and for what the employer is liable had been carefully laid down by the Supreme Court of the United States in the case of:

Arizona Copper Co. vs. Hammer
63 Law Ed. 1058.

and in passing, we want to say that the Supreme Court has held that said accident and injury must be based upon and due to the inherent conditions of the occupation.

This question is dependent upon the construction of the Arizona statute. Other states have other statutes, and the statute itself must be looked to carefully. We have some cases which we feel are of great persuasive weight to this Court, although deciding questions based upon other statutes. This question has not been determined by our own Supreme Court. We call particular attention to the following cases:

Pacific Coast Casualty Co. vs. Pillsbury
153 Pac. p. 24 (Calif)

Ruth vs. Witherspoon Engr. Co.
157 Pac. 403 (Kansas)

We want the Court to keep in mind the language of our statute. It says:

> "Injury caused by any accident due to a condition or conditions of such occupation."

There is no language of "proximately caused", no language of "resulting from", no limitation, no enlargement; the injury complained of must have been caused by the accident, and the accident must be due to the condition of the occupation.

See:

Kill vs. Industrial Comm. of Wisconsin
152 N. W. 148 (Wis.)

~~Seleck vs. Janesville~~
55 N. W. 696 (Wis.)
20 L. R. A. 541

Selleck vs. Janespille
75 N. W. 975 (Wis.)
41 L. R. A. 563

Lesh vs. Illinois Steel Co.
157 N. W. 539 (Wis.)

There was no allegation and no evidence showing that the inherent risks and hazards of the occupation caused the *infection*. There is no allegation and no proof, or anything tending to prove, that the *injury* caused the loss of the eye. Everywhere, both in allegation and proof, what little there is, goes not to the *injury* but to the *infection*. Nowhere in either proof, or the allegations, are we held liable for the *injury*,—everywhere for the *infection*. There is no allegation, no proof that a poisonous substance got in the eye, while working; no allegation that the piece of rock was infected; no allegation that he was handling infected materials, or poisonous materials.

All the evidence in the case shows that the infection was from syphillis. There is no evidence to show that the infection occured without the fault of the plaintiff. This question was raised also in our Motion for a Directed Verdict at the close of the Plaintiff's case, and again at the close of all of the evidence, and it was raised in our Motion for a New Trial, upon the ground that the verdict and judgment is contrary to

the law. The evidence shows that this slight injury to the eye, without the infection, would have caused practically no permanent results and would not have interfered with the vision. The infection itself, or a former injury, was the real cause of the permanent condition of the eye. No evidence to show that the infection was the result of the injury, as alleged; no evidence to show that it was caused by the accident; no evidence to show that it was due to a condition of the employment. Our position is that this Complaint does not state a cause of action under our Employer's Liability Law, and also that the Court erred in not directing a verdict because the burden of showing that the plaintiff had complied with the law and made out a case according to the evidence, was not carried by the plaintiff. A very enlightening case upon this whole question is the case of:

McCoy vs. Michigan Screw Co.,
147 N. W. 572 (Mich.)

and also reported in:

Vol. 5 Negligence Cases p. 455

This case is especially called to the attention of this Court.

See also:

Guthrie vs. Detroit Shipbuilding Co.
167 N. W. 37

In re Knight
120 N. E. 395

A case, almost parallel to the present one is the case of:

Doolan vs. Henry Hope & Sons
(1918) W. C. & Ins. Rep. 121
119 L. T. R. 14

See also:

Miller vs. Jenson & Nicholson
(1918) W. C. & Ins. Rep. 51
Grant vs. G. & G. Kynoch
(1918) W. C. & Ins. Rep. 117
Perry vs. Woodward Bowling Alley
163 N. W. 52

We respectfully submit that said Demurrer should have been sustained; that the objection to the introduction of evidence should have been sustained. We fully urged all of these objections, both on Demurrer, and upon our objection to the introduction of evidence to the Trial Court. (See Transcript of Record, page 15; also pages 34-35), and the Motion for a Directed Verdict, at the close of Plaintiff's case, and certainly at the close of all of the evidence, should have been sustained, for the foregoing reasons.

(ASSIGNMENTS OF ERROR NO. III AND IV)

Assignments of Error Number III and IV raise the same question of law, that is that the physician's evidence is not privileged to contradict a sworn statement of the patient, the plaintiff. The plaintiff had stated, in the one instance, that the doctor took some dirt out of his eye. (2nd) The patient, and plaintiff, stated that on a former occasion a certain doctor had treated both of his eyes. The doctor was asked in the one instance, the direct question: "Did he remove any dirt

from his eye?" And in the other: Did he treat both of his eyes at that time?" There was no question as to what treatment he did give. There was no question asked as to what condition he found the eye in, or what he discovered. It was solely for the purpose of impeachment. The privilege does not extend to such a question::

40 Cyc. 2040
Note 88

and is not embraced within our statute, (Section 6, Paragraph 1677, Civil Code of Arizona), and is not within this statute, as construed by the Supreme Court of Arizona.

Arizona Copper Co. vs. Burciaga
20 Ariz. 85

Railroad vs. Clark
235 U. S. 669

It is a quite familiar rule that where the patient voluntarily goes into detail, regarding the nature of his injuries, testifying as to what the physician did, or said, while in attendance, that the privilege is waived, and the adverse party may examine the physician.

28 Ruling Case Law p. 134
Note 6

National Association vs. McCall
48 L. R. A. (N. S.) 418

Epstein vs. Pennsylvania Ry., Co.
156 S. W. 699

Annotated Cases 1915 (a)
423

48 L. R. A. (N. S.) 394
and note

The privilege extends only to matters which are in their nature, confidential, and does not prevent a physician from testifying as to matters, the disclosure of which involves no breach of professional ethics.

40 Cyc. 2384
and cases cited under
Note 45

We are not unmindful of the decision in the Phelps-Dodge Corporation vs. Gurrero case, 273 Fed. 415, but we think there is a plain distinction between the questions involved therein and the ruling here complained of.

Our point is that the statement of the treatment given is neither a communication, nor knowledge, obtained by personal examination of such patient. That is all our statute prohibits, and certainly even under the Gurrero and Clark decisions, the defendant should be entitled to contradict statements of the plaintiff as to what the physician did, without disclosing any communication or conveying any knowledge obtained by personal examination of the patient.

See:

Moreno vs. New Gualalupa Min. Co.
170 Pac. 1088

(See bottom of page 1091, 2nd col. and 1st col. on page 1092, where Wigmore on Evidence on this question is quoted with approval).

(ASSIGNMENT OF ERROR NO. V)

Assignment No. V raises the question of whether a Nurse is within the rule and the statute of Arizona, as to privileged communications. We take the position that she is not a physician or surgeon, and not within the prohibition of the statute. There is no rule at Common Law, which prohibits a Surgeon or Physician, or a Nurse, from testifying. Our Statute being in derogation of the Common Law, and while liberally construed, it cannot be extended beyond the plain terms of the Statute. Its plain terms provide:

Paragraph 1677 (Sec. 6) Civil Code of Arizona:

> "*A Physician or Surgeon* cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The law applies, strictly, to physician or surgeon, and not to an outsider, or to a Nurse, or to a by-stander.

This Nurse had valuable testimony to give. She saw the eye. She knew its condition. She knew its condition as to former injury. The importance of such testimony to be given by her could not be ques-

tioned. The question is: Does she come within the Statute of Arizona?

This whole question is embraced in the law as laid down in:

40 Cyc. (Sec. 5)
page 2381
28 Ruling Case Law
par. 121

At Common Law there was no privilege as to communications between physician and patient, and the rule still prevails where there is no statute, as laid down by the above citations. It is therefore a question of what the Statute provides.

In order for a physician to be incompetent, the relation of physician and patient must have existed between him and the person in question:

40 Cyc. page 2382
Sub-head (B) Par. 5

The rule against disclosure applies only to those who are engaged as general practitioners of medicine and surgery, and whose business as a whole comes within the definition of "physician" or "surgeon."

40 Cyc. page 2383
Note 38

Citing:

People vs. DeFrance
62 N. W. 709
28 L. A. R. 139

Brown vs. Hannibal
66 Mo. 588

Duetschmann vs. Third Ave. Railway
84 N. Y. S. 887

Hendershot vs. Western Union Tl.
76 N. W. 828

Vol. 28 Ruling Case Law
Par. 128

General subject "Witnesses" Sub-head: "Who are witnesses within meaning of statute."

Some cases have gone so far as to hold that a physician, to be disqualified, must be one duly authorized to practice his profession, under the laws of the State in which his testimony is offered, and that it does not apply to persons not so authorized, even though they are engaged in the practice as physicians elsewhere.

Headcann vs. Locher
68 Pac. 136

Colorado Springs Co. vs. Fogelson
94 Pac. 356

Wm. Laurie Co. vs. McCullough
90 N. E. 1014

40 Cyc. 2383
Note 39

See also:

Annotated Cases 1913 (A)
Page 49

Even where the prohibtion is made to apply generally to physicians, the word is construed to include those, only, who are lawfully engaged in the practice of medicine, and therefore duly authorized to pursue that vocation.

28 Ruling Case Law
Sec. 128

A dentist is not a physician, or surgeon, within the statutes relating to privileged communications.

People vs. DeFrance
28 L. R. A. (N. S.) 139
cited above.

nor is a druggist or drug clerk:

28 Ruling Case Law
Sec. 128. Note 20

nor is a Veterinarian Surgeon:

Hendershot case cited above.

The relation of physician and patient must exist before the statute applies.

28 Ruling Case Law
Par. 129

Where a conversation between a physician and patient takes place in the presence and hearing of a third person, such third person may testify as to what was said.

40 Cyc. 2388
Note 79

Springer vs. Byram
36 N. E. 361

Indiana Traction Co. vs. Thomas
88 N. E. 356

Mason's Union Life vs. Brockman
59 N. E. 401

Wells vs. New England Rd.
40 Atl. 802

Some Courts have gone to the extent of holding that even a physician may testify as to what was said in a conversation between himself, the patient, and a third person.

State vs. Werner
112 N. W. 60

There are some States that have extended the Statute to nurses, and under such statutes, of course, the nurse cannot testify, but we have no such statute in Arizona.

The case of:

Homnyack vs. Prudential Life Ins.
87 N. E. 769

is interesting because it passes upon a statute which expressly includes professional and registered nurses, showing clearly that if the Legislature of Arizona had intended to include nurses within the prohibition of the statute they would have expressly so provided.

In this connection we want to call the Court's attention to Section 4 (of the same Chapter and of this same statute they would have expressly so provided.
Legislature, at the same time that Paragraph 6 was enacted.) of Paragraph 1677 of the Revised Statutes of Arizona, on Privilege, which provides:

> "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; *nor can an Attorney's sec-*

> *retary, stenographer, or clerk be examined*, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

It will be noted that the Attorney's Secretary, Clerk and Stenographer, is expressly included in the statute. If it was intended by the Legislature to include nurses within the statute, or hospital attendants, or any other persons, save and except the physician or surgeon himself, it could have easily been definitely stated in the statute. If nurses are to be included within this statute, the statute must be amended. The statute, being contrary to the Common Law, it cannot be enlarged by intendment.

See:

Laurie vs. McCullough
90 N. E. 1014
Syllabus No. 13

where they hold that this statute, being in derogation of the Common Law, cannot be enlarged by intendment. A very interesting case upon this question is the case of.

Howe vs. Reagenburg
132 N. Y. S. 837

This case is interesting because it defines who are physicians within such a statute, and it is further interesting because it permits the secretary of the prohibited person to testify.

If our Legislature had so intended they could have easily inserted the word "nurse" in our statute.

Our Supreme Court, in the case of *Flowing Wells vs. Culin*, 11 *Ariz.* 425, *reading from page* 429, says:

> "We recognize that it is the duty of all Courts to confine themselves to the words of the legislature, nothing adding thereto; nothing demitting. The Court has no authority to extend the law beyond the fair and reasonable meaning of its terms, because of some supposed policy of the law."

And, if the Legislature had intended to include nurses, within this statute, it would have used apt words to have included them.

State of Arizona vs. Inspiration Copp. Co.
20 Ariz. 503

reading from top of page 512.

Roberts vs. City of Ottawa
165 Pac. 869
last par. col. 1, page 870

Donohue vs. City of Newberry Port
98 N. E. 1081

reading from middle of first column, on page 1083:

> "When the legislature has intended to include both municipal and business corporations, within the scope of a statute, generally, it has used plain words to that effect."

(ASSIGNMENTS OF ERROR NO. VI AND VII)

The Court erred in sustaining the objection of the plaintiff to our offer to prove that Doctor Buck was appointed under the Arizona Statute, Session Laws 1923,

Chap. 30, page 102, quoted above in this Brief, which permits said action, and we had the right to show that this doctor was so appointed and that he was impartial and unbiased and not in our employ, or directly opposed to the Plaintiff. Under the familiar rule of evidence, that the interest or lack of interest, or the bias or prejudice of the witness may be shown, we feel that the Trial Court erred.

To the same effect is Assignment No. VII, only the converse of the proposition exists, as we undertook to prove that Doctor Bakes was biased and prejudiced in favor of the Plaintiff because he was in the habit of appearing in behalf of the plaintiff in personal injury cases. The Court erred in refusing to permit us to show that bias and prejudice of Doctor Bakes, and erred in refusing to permit us to show that Doctor Buck was a competent and disinterested physician and that he was appointed under the order of the Court to examine the Plaintiff. This error was made more glaring by the giving of certain instructions to the jury. (See Instructions of the Court on the questions of certain Physicians being appointed. See also Transcript of Record, page 56.)

See:

Jones on Evidence, 3rd Ed.
Secs. 826, 828 and 902

(ASSIGNMENT OF ERROR NO. VIII)

The Court erred in permitting the Plaintiff to offer the testimony of Doctor Bakes over our objection as to

the term, "occupational or industrial blindness." There is no issue of industrial blindness in the case. There is no such provision of the statute of Arizona. There is no law of Arizona relative to occupational disease or industrial qualifications or disqualifications. The doctor stated over our objections that the Plaintiff was occupationally blind in his left eye. The Complaint charged total and permament disability. Our authorities in support of this position are the pleadings and the issue tendered thereby, the section of the Arizona Statute quoted above which gives a right of action upon which this cause is founded, to-wit: Sec. 3154 and 3158 Civil Code of Arizona.

(ASSIGNMENTS OF ERROR NO. IX AND X)

Assignments No. IX and X are the same. The only difference is the difference in the witness tendered by the defendant. One was Doctor Vivian, and the other Doctor Gatterdam. The Defendant had offered testimony of Doctor Buck and Mr. Culp as to the present condition and the cause of that condition of the Plaintiff's left eye. This testimony showed, (1st) that there was no outside injury to the eye, such as a cut, that would be caused by a rock or a piece of steel; (2nd) that the injury to the eye was internal and occasioned by disease. Doctor Vivian and Doctor Gatterdam had been present in the court room and heard all of the testimony offered by the defense upon their theory of the case. After all of this testimony was before the jury the Defendant tendered the testimony

of these two doctors, (qualified them as to their education, qualified them as to having heard all of this testimony and then further qualified the questions by assuming the facts stated by Doctor Buck and Mr. Culp, ((all of the witnesses who had testified for the defense on this theory of the case.)) were true, and asked them, what, in their opinion was the cause of and the condition present in the Plaintiff's eye, expecting to prove by said expert evidence that it was internal and caused by a blood condition, and not by external injury. The Court erred in refusing to permit such a hypothetical question. The province of the jury was not invaded by the question; the expert was not called upon to pass upon the evidence for the Plaintiff and weigh it against the evidence of the Defendant; all they were asked to do was to base their opinion upon all of the evidence for the Defendant. Such evidence is admissible as a hypothetical question. The trial Court was apparently confused with the rule that:

> "An expert generally cannot be allowed to base his opinion on the evidence he has heard given in the case."

That is the general rule, but, he can give his opinion based upon all of the evidence of either side of the controversy. This whole question and the law upon the proposition is laid down in:

Vol. 11 Ruling Case Law
"Expert and Opinion Evidence"
Section 12

and we call the Court's attention, particularly, to the following:

> "After the whole of the testimony delivered by one of the parties or by certain of the witnesses for one party is made known to the expert either by his reading it or hearing it, and he is then asked his opinion upon it, assuming it to be true, in either case the opinion is sought upon an assumed state of facts and may therefore be given."

See also:

Yardley vs. Cuthbertson
1 Atl. 765 (Pa)

Kliegen vs. Aitken
69 N. W. 67 (Wis.)
35 L. R. A. 249

City of Chicago vs. Didier
81 N. E. 689 (Ill.)

Assets Realization Co. vs. Wellington
194 Fed. 87

Vol. 17 Cyc. page 253, par. 4
"Evidence"
and cases cited thereunder.

See also:

Expansion Gold Min. Co. vs. Campbell
163 Pac. 968 (Colo.)

Howland vs. Oakland Cons. St. Ry. Co.
42 Pac. 983 (Cal.)

The case of Dexter vs. Hall, 21 L. Ed. page 73, is one of the leading cases upon this question, and the

decision written a good many years ago. We call the Court's particular attention to the fourth from the last paragraph in this decision and ask the Court to note that the witness was however, "allowed to give his opinion upon the testimony adduced by the plaintiff's" but they held that the witness could not give his opinion upon all of the facts, as this would be passing upon the questions for the jury, but they recognize the rule and distinction which we are maintaining, that the expert witness may give his opinion upon the evidence for one side or the other, of the case. The Court's refusal to permit this testimony was particularly harmful to us in view of the fact that we were foreclosed in having any medical testimony except Doctor Buck's and in further view of the fact that the Plaintiff was permitted in rebuttal to establish by the testimony of Doctor Bakes, (See Transcript of Record, Pages 78 and 79, " that there was no connection between the injury and the syyhilitic condition of the patient."

(ASSIGNMENTS OF ERROR NO. XI, XII, XIII, XIV, XV AND XVI)

The other Assignments of Error, No. XI, XII, XIII, XIV, XV, and XVI, are embraced in the foregoing except that "the verdict was not supported by the evidence," and that "the verdict was contrary to law," and that "the Trial Court erred in refusing to grant Defendant a new trial." The evidence was insufficient to support a verdict for One Thousand Dollars. The evidence tended to prove either of the following:

(1st) That the Plaintiff was not entitled to recover any damage, or

(2nd) If entitled to recover anything he was entitled to recover more than One Thousand Dollars.

The loss of the eye,, if Defendant was responsible could not be compensated for in the sum of One Thousand Dollars. On the other hand, if Defendant was not responsible, the One Thousand Dollars was a gratuity and not based on any evidence in the case. The jury apparently compromised and gave a judgment not based upon the evidence. If they believed Plaintiff's evidence and believed that he was totally blind, or, if you please, if they believed he was occupationally blind, he was entitled to more than One Thousand Dollars. On the other hand, if they believed that he was not injured at all while in the employ of Defendant, then they should have returned a verdict for the the Defendant. Juries have no right to return verdicts not based upon evidence. See:

Southwestern Ariz. Fruit & Irrig. Co. vs. Cameron
141 Pac. 572 (Ariz.)
Thompson on Trials, Sec. 2606,

as follows:

"Where the verdict which the jury returns cannot be justified upon any hypothesis presented by the evidence, it ought to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for $100.00, and the only defense was that the defendant did not execute the note, and the

> jury should return a verdict for $50.00 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should assume, in disregard of the law and evidence, to arbitrate differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim."

The evidence is also fatally defective because there is no evidence of any kind to show that the infection was the result of the injury. We recognize the rule that if there was any evidence it should go to the judges of disputed facts, but where, as in this case, there is no evidence showing that the infection was caused by the injury, then there is a complete failure of proof, and it requires no citation of authorities to this Court to establish the law upon that proposition. Again, there is a fatal lack of evidence to show that the infection resulting from this injury caused the loss of the sight of the eye. There is no evidence tending to show that said infection caused the loss; all is guess, conjecture, supposition. No authorities are required upon that proposition as it is too well established as a rule of law.

See:

Ash vs. Childs Din. Hall Co.
120 N. E. 396

In conclusion we wish to emphasize Assignment No. XI, and Assignment No. XIII.

There is no evidence in this case tending to support the allegations of the Complaint. There is no evidence of any sort, or kind, in this record showing that there was any infection of this eye, other than the Syphilitic infection. There was no evidence that the injury, caused by the accident, impaired the vision of the eye. There is nothing in this record to show that any infection of the eye caused its present condition, except the Syphilitic infection, brought out in the evidence of the defendant.

We challenge Counsel to point in the record to one line of testimony showing what caused this permanent condition of this eye, save any except the Syphilitic infection or the former injury. There is nothing in the evidence of the Plaintiff. There is nothing in the evidence of any of the witnesses for the Plaintiff. The evidence of Dr. Bakes, for the Plaintiff, shows there was an injury, or an ulcer, but when and where, or how it came, or what connection it has with this case, the record is silent.

The Court should have, under the old familiar rule, Ash vs. Childs, 120 N. E. 326, cited above, directed a verdict.

Western Union Tel. Co. vs. Totten
72 C. C. A. 591
141 Fed. 533

There is nothing but guess, nothing but conjecture, no evidence of any kind or character.

We have tried to fairly cite to the Court every page of the Transcript of Record, as to the entire evidence bearing upon these questions. We have inserted them at the particular place in our Brief, but for fear something has been overlooked, and in view of the fact that the record is very short, we especially call the Court's attention to the following pages of the Transcript of Record, as bearing upon the questions here involved, to-wit:

Pages 12-14; page 15; pages 18-19; pages 27-32, inclusive; pages 34-35; pages 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 59, 60, 61, 62, 63, 73, 74, 75, 76, 77, 78 and 79.

There are several very pronounced and important questions raised on this Writ of Error. They are:

(First) The construction of the Employers' Liability Law of Arizona, as to whether a cause of action is stated in the Complaint, based thereupon. This we raised by Demurrer and by the objection to the introduction of any evidence;

(Second) The refusal of the Court to grant a Directed Verdict, upon our Motion at the close of Plaintiff's case, and again at the close of all of the evidence.

(Third) The absolute failure of proof to support the allegations of the Complaint, either as to the injury, or as to the infection resulting from the injury;

(Fourth) The right of a Nurse to testify in this

case. Our contention is that she is not within the "Privileged" Statute of Arizona, relative to physicians and surgeons, and being permitted, under all the rules of evidence, to testify, unless prohibited by said Statute, the Court erred in holding that she came within said Statute.

(Fifth) The right of expert witnesses to testify to a hypothetical question, based upon all of the evidence which they had personally heard in the court room, introduced on behalf of the Defendant.

(Sixth) The right of physicians to contradict, or impeach a patient, said contradiction involving no question of communication, or disclosure of knowledge obtained by the physician. (For instance, suppose the patient testifies that Doctor Brown, his physician removed his right eye, on a certain day, in a certain operation. Certainly, Doctor Brown could be asked to deny that fact and state that he did not remove such eye. He would be precluded, probably, from telling what he did do, or what he observed, but he certainly could be permitted to directly contradict such a positive statement).

The other questions raised here are by no means waived by this recapitulation of the points relied upon by us, because they are very important when taken in connection with those named above, all bearing toward the same end,—that is to say that the defendant did not have a fair and impartial trial, upon the issues

here in and upon the law of Arizona relating thereto, and upon which Plaintiff's action is based.

Respectfully submitted.

ANDERSON, GALE AND MILLER,

Attorneys for Plaintiff in Error.

No. 4445

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHWEST METALS COMPANY,
a Corporation,
Plaintiff in Error,
vs.
FRANCISCO GOMEZ,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF DEFENDANT IN ERROR

STRUCKMEYER, JENNINGS & STROUSS,
AND D. A. FRASER,
Phoenix, Arizona,
Attorneys for Defendant in Error.

Filed this..........day of.........., 1925.
FRANK D. MONCKTON,
Clerk.

By..........
Deputy Clerk.

FILED
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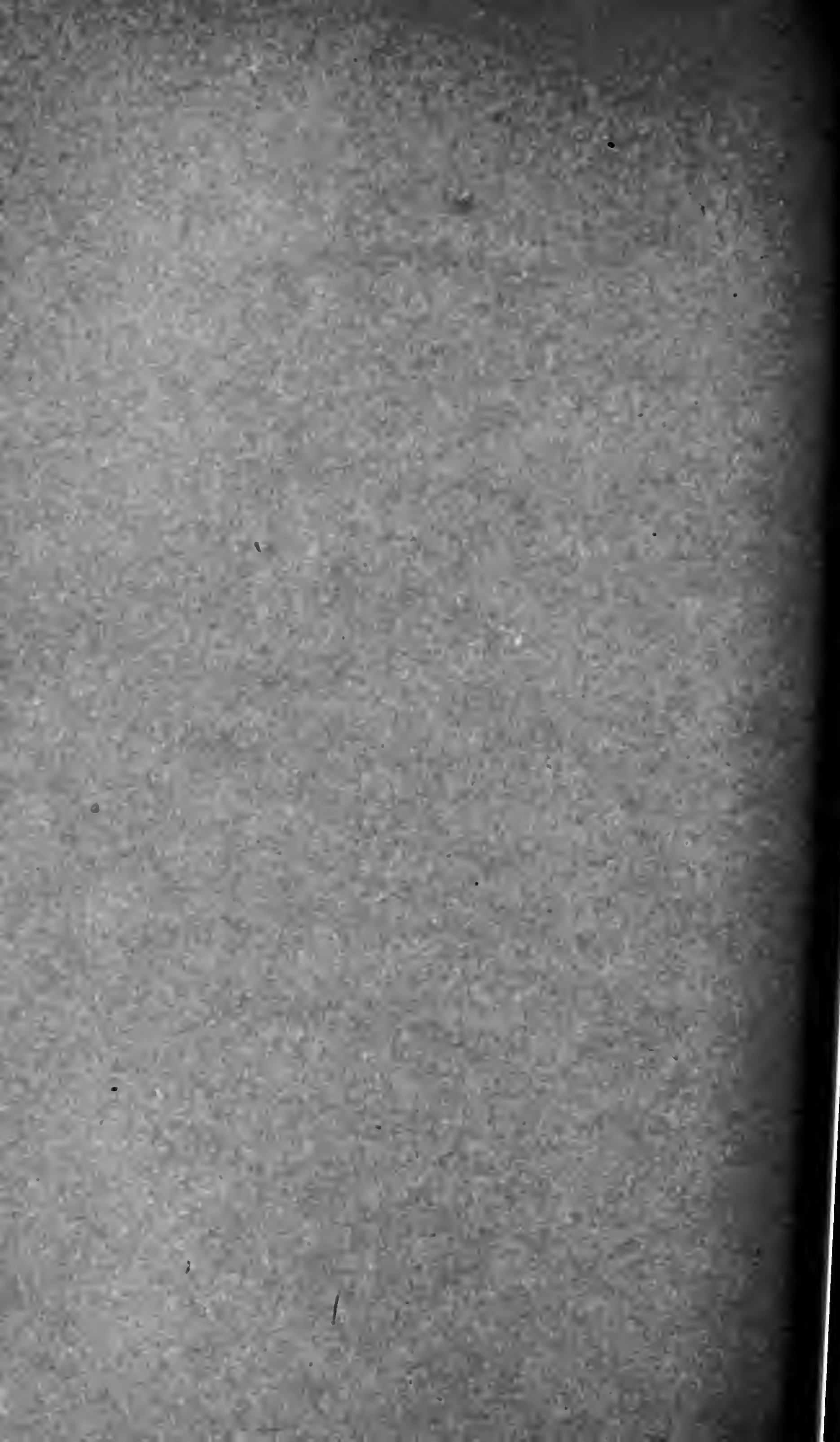

United States Circuit Court of Appeals

For the Ninth Circuit

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No. 4445

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

In filing his brief herein the Defendant in Error does not waive his motion to strike Bill of Exceptions but most respectfully insists thereon.

Our only controversy with the statement of the case as made by the Plaintiff in Error is with that portion of said statement found at page four of the brief of the Plaintiff in Error reading as follows:

> "Defendant offered to prove by the nurse what treatment was given to the Plaintiff, and her observations of the eye, and what *she knew independent* of the physician by reason

of her observations in the capacity of nurse. This the Court refused, and an exception was taken. (See Transcript of Record, page 53)."

If by this statement Plaintiff in Error means to say that the testimony, or evidence offered to be proven by the nurse, was in respect to information secured by her as a nurse independant of her relation to Doctor Franklin, then we say that such is not a true and correct interpretation of the record, but that the true facts are that the testimony and evidence offered by this witness was in respect to information acquired by her while acting as assistant to and agent of Dr. Franklin (See Transcript of Record, page 53).

Before entering upon the argument of the Assignments of Error made by the Plaintiff in Error we desire to point out that no exception was taken by the Plaintiff in Error to the order of the Trial Court denying the motion of plaintiff in Error for a new trial. (Trans. of Rec. p. 81). We therefore, most respectfully contend that all errors which were or could have been urged on the motion for a new trial were waived by the failure of the Plaintiff in Error to except to the ruling of the Trial Court on the motion for a new trial. Having failed to except to the ruling on the motion for a new trial it cannot be reviewed and it follows that any matter which might have been properly urged under the motion is not reviewable. Therefore the only assignment of error properly before this Court is Assignment No. I,

that is as to the sufficiency of the complaint to state a cause of action.

National Surety Co. vs. City of Hobart (Okla.) 162, Pac. 954;

Great Spirit Springs Co., vs. Chicago Lumber Co. (Kan.) 28 Pac. 714;

Turner vs. Franklin, 10 Ariz. 188; 85 Pac. 1070 (and see Spicer vs. Simms, 6 Ariz., 347; 57 Pac. 610);

State ex rel Saunders vs. Clark (Neb.) 82 N. W. 8;

Blonde vs. Merriam (Wyo.) 133 Pac. 1076;

Martin vs. Payne (Colo.) 114 Pac. 486.

ARGUMENT, POINTS AND AUTHORITIES

Assignments of Error I, II, and XI

The first two Assignments of Error are directed to the refusal of the trial court to sustain defendant's demurrer to the complaint, and objection to the introduction of any evidence. The error here urged attacks the sufficiency of the complaint to state a cause of action.

In Calumet and Ariz. M. Co., vs. Chambers, 20 Ariz., 54; 176 Pac. 839, in determining what must be alleged and proved under the Employer's Liability Act of Arizona, the court said:

> "The plaintiff, in order to recover under the employer's liability law, is required to allege

> in his complaint and sustain by evidence that he was employed by the defendant in an occupation declared hazardous, and while engaged in the performance of the duties required of him was injured, and the injury was caused by an accident due to a condition or conditions of such employment, and was not caused by the negligence of the plaintiff."

We do not understand the Plaintiff in Error to contend, nor does it argue, that the complaint herein fails to meet these requirements except that it seems to be contended that no injury is alleged. The contention of Plaintiff in Error is found at page 13 of its brief.

The vacuity of the argument of the Plaintiff in Error renders difficult an attack thereon. The fallacy of the argument is so apparent that the argument itself hardly merits an answer. Plaintiff in Error says at the bottom of page 12 of its brief:

> "This complaint charges that an accident caused a piece of rock to strike the plaintiff in the left eye, thereby injuring said eye "—" "The infection was charged to have resulted from the injury."

And then Plaintiff in Error serenely proceeds to argue that the complaint fails to state a cause of action in that it does not allege that the accident caused the infection. We most respectfully submit that were this conclusion correct, that the

language used in the complaint does not relate the infection to the accident, still the remedy of the Plaintiff in Error with respect to the allegation of infection was by motion to strike as surplusage and not by demurrer, as all the elements of a cause of action under the Employer's Liability Law as stated in the Chambers case supra are present without this allegation. However, it is our opinion that to reach the conclusion argued by the Plaintiff in Error requires a most *ingenuous* closing of the mind to the meaning of simple English words, for it would seem to us that to say that an accident caused an injury which resulted in an infection is about as simple a way as possible to say that the infection was the result of the accident, and we most respectfully direct the Court's attention to the following from Arizona Copper Co., Ltd. vs. Burciaga, 20 Ariz. 85; 177 Pac. 29.

> "Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the *employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss*, are matters of actual loss and as such recoverable.

We deem this sufficient answer to the discussion of Plaintiff in Error on Assignments I and II. The

question of proof though extensively referred to by Plaintiff in Error is of no concern here. The contention of Plaintiff in Error that injuries must be from risks *inherent* in the occupation is answered by Consolidated Ariz. Copper Co. vs. Egich, 22 Ariz. 543, 199 Pac. 132, in which one of the present counsel for Plaintiff in Error appeared for the appellant.

Assignments of Error III and IV

Assignments III and IV are considered together, the identical question being presented in each. However, we submit that Assignment No. III is not properly before the Court because the question asked by counsel was withdrawn before the ruling of the Court. (Trans. of Rec., page 45.) The plaintiff on *cross-examination* testified that Dr. Franklin removed dirt from his eye and that Dr. Vivian had treated both eyes. He had not testified to this on *direct examination.* The defendant then offered the testimony of the doctors which was objected to as privileged. There is no dispute that the relation of physician and patient existed. The question is whether the privilege was waived by the testimony of the plaintiff, Gomez.

We first direct the Court's attention to the provisions of our Statute, Par. 1677, Rev. St. Ariz. 1913.

> "* * * Provided, that if a person offer himself as a witness and *voluntarily* testify * * * that is to be deemed a consent to

the examination of such physician or attorney."

To constitute consent the testimony must be *voluntary.* Testimony given on cross-examination is not voluntary within the meaning of this Statute.

Jones Com. on Evid. Vol. 4, Sec. 761, page 569.

Union Pac. R. Co. vs. Thomas, 152 Fed. 365.

Certainly the Statute would be of little value if the opposing party could by cross-examination lay the foundation for taking away the privilege.

In construing Par. 1677 supra, the Supreme Court of the United States in Railroad Co. vs. Clark, 253 U. S. 669-59 L. Ed. 415, held that the patient in testifying waived the privilege only with respect to what he told the physician, and not as to the knowledge gained by the physician by his examination and the treatment given. This construction of the Statute was followed by the Supreme Court of Arizona in Arizona Copper Co. Ltd. vs. Garcia, 25 Ariz. 158-214 Pac. 317. In the Garcia case, the plaintiff's brother testified on behalf of plaintiff that the physician did in the course of his treatment remove fragments of bone from the plaintiff's leg. The defendant offered to contradict this by the testimony of the physician and the objection based on the claim of privilege was sustained by the Trial Court and the ruling affirmed by the Supreme Court. It is identical with the instant case. And see Inspiration Co. vs. Mindez 19 Ariz. 151, 168; 166 Pac. 278.

Assignment of Error No. V.

Of the sixteen Assignments of Error made by the Plaintiff in Error, this is the only one which even *appears* to savor of merit, and upon analysis it too will be found of no merit whatever. In fact we seriously doubt that *it* can be said to even have the *appearance* of merit.

The question presented is whether the testimony of a nurse who is assisting the physician is privileged within the meaning of Par. 1677, Rev. St. Ariz. 1913, Sec. (6), which provides as follows:

> (6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney.

The nurse called by the defendant stated on preliminary examination that she was Dr. Franklin's assistant and assisted in treating the plaintiff. It is undisputed that the relation of physician and patient existed between Dr. Franklin and the plaintiff. Does this privilege extend to the physician's assistant? We note that Plaintiff in Error has used two pages to argue a nurse is not a physi-

cian or surgeon. In that at least Plaintiff in Error is right. A nurse is not physician or surgeon, and we have never so contended. Plaintiff in Error fails to distinguish between a nurse as an independent person, and a nurse acting as the agent or assistant of the physician. The nurse here was asked to testify concerning information secured, not as an independent person, but as the assistant to the doctor. It is the effect of this relation which is here considered. Reported cases are few in which the precise question has been before the Courts. However, we are not without authority of the highest order on the very point at issue. Mr. Wigmore in his great work on Evidence, Second Edition, Vol. 5, paragraph 2381, says:

> "As with the other privileges, however, the privilege forbids compulsory disclosure by that person only to whom the evidence was extended. It, therefore, does not exempt a third person, overhearing the communication, from testifying to it; *except so far* as the third person *is an agent* of the physician." (Italics are ours.)

And in his note to paragraph 2382, Mr. Wigmore says:

> "A nurse as an independent person, receiving medical confidences as such, is not within the privilege; *but a person acting* as the *agent* of a physician *is within the privilege*." (Italics are ours.)

The following statement is taken from Jones' Com. on Evid. Vol. 4, par. 759 at page 552:

> "On the same principle, the privilege extends as in the case of attorneys, to the communications necessarily made to the physician's assistant."

And see 40 Cyc. 2388, par. d.

In Springer vs. Bryam, 137 Ind. 15; 36 N. E. 361 under a statute very similar to ours, the Supreme Court of the State of Indiana, discussing the privilege in respect to a physician, and pointing out the analogy to the privilege in respect to attorneys, giving a like construction to each, says:

> "Neither can the disclosure be made by other persons whose intervention is strictly necessary to enable the parties to communicate with each other."

And see the following with reference to records kept by attendants:

Stalker vs. Breeze (Ind.) 114 N. E. 968;
Smart vs. Kansas City, 208 Mo. 162; 105 S. W. 709;

Price vs. Standard etc. Co. 90 Minn. 264; 95 N. W. 1118.

In Cahen vs. Continental Ins. Co. 41 N. Y. super. Ct., 296, it was held that the privilege may attach notwithstanding the presence of third persons, including nurses or assistants, in the room.

In North Amer. Union vs. Oleske (Ind.) 116 N. E. 68, it was held that the privilege applied to a person through whom it was necessary for the physician to communicate in order to prescribe for the patient.

In Mutual Life Ins. Co. vs. Owen, 111 Ark. 554; 164 S. W. 720, a physician who was merely a guest of the attending physician accompanied the latter while he examined the patient. He was held within the privilege. So in Renihan vs. Dennin, 103 N. Y. 573, 9 N. E. 320, and in Prader vs. National Masonic Acc. Assoc. 95 Ia. 156; 63 N. W. 601, it was held that the information secured by a consulting physician, called in by the attending physician, is within the privilege. And in Raymond vs. R. R .Co. 65 Ia. 152; 21 N. W. 495 and Aetna Ins. Co. vs. Deming, 24 N. E. 86, the privilege was held to extend to the partner of the attending physician, although he did not treat patient, and the relation of physician and patient did not as a fact exist.

In all these cases, a guest accompanying attending physician, consulting physician called in, partner of attending physician, third person necessary for patient to communicate with physician, the witness sought to be examined did not come within the letter of the law because the true relation of physician and patient did not exist, but the Court in each instance held the testimony to come within the spirit of the law, and allowed the privilege.

It is interesting to note that the Plaintiff in

Error, while citing numerous authorities applying to points not in issue here, has failed to cite one authority even remotely in point on the issue, that is, *does the privilege* apply to a nurse acting as the *assistant* or *agent* of the physician. The only authority cited by appellant approaching the issue is Homnyack vs. Prudential Life Ins. 87 N. E. 769, concerning which Plaintiff in Error says, it:

> "is interesting because it passes upon a statute which expressly includes professional and registered nurses, showing clearly that if the legislature of Arizona had intended to include nurses within the prohibition of the Statute they would have expressly so provided."

Can it be that learned counsel for the Plaintiff in Error have failed to understand that the Indiana Court was there passing on the application of the privilege to *a nurse as an independent person* and *not* a nurse as the *assistant* or *agent* of the physician, and that the Indiana Statute refers to a like situation.

Plaintiff in Error contends that this Statute is in derogation of the common law and should, therefore, be strictly construed. Probably Plaintiff in Error has overlooked Par. 5551, Rev. St. Ariz. 1913: "The rule of the common law that statutes in derogation thereof are to be strictly construed shall not apply to the statutes of this State, but such Statutes and all proceedings under them shall be liberally construed with a view to

effect their objects and to promote justice." But aside from this statute, while it is true that at common law no such privilege extended to communications with physicians as protected communications with attorneys yet the statutes creating the privilege with respect to physician are remedial and are therefore to be *liberally* construed.

> Ariz. and N. M. Ry. Co. vs. Clark 207 Fed 817; Affirmed 253 U. S. 669-59 L. Ed. 415;
>
> Phelps Dodge Corp. vs. Guerrero, 273 Fed. 415;
>
> Manufacturers etc. Co. vs. Brennan, 270 Fed. 173.

And see Gideon vs. St. Charles, 16 Ariz. 435; 146 Pac. 925 where it is held that the court may *enlarge* or restrict words or clauses in order to effectuate the *purpose* of the statute.

> "The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences. The question of dealing justly as between the patient and third parties is a secondary consideration."
>
> Ariz. & N. M. R. Co. vs. Clark, 253 U. S. 669; 59 L. Ed. 415.

The privilege in respect to physicians was first enacted in New York, most of the other states hav-

ing later adopted like statutes. The purpose in the enactment of all these statutes was to cover the relation of physician and patient with a cloak of confidence, to place it on the same basis as the relation of attorney and client, and thus to allow a greater freedom in the communications by the patient to the physicians in regard to matters touching the disease of the patient.

And see:

Mutual Life Ins. Co. v. Owens, 111 Ark. 554; 164 S. W. 720;

Springer v. Bryan, 137 Ind. 15; 35 N. E. 361;

Smart v. Kansas City, 208 Mo. 162; 105 S. W. 709;

Cahen v. Continental Ins., 41 N. Y. Super. Ct. 296;

North Amer. Union v. Oleske (Ind.), 116 N. E. 68;

Edington v. Ins. Co., 67 N .Y. 185, 194;

Raymond v. R. R. Co., 65 Ia. 152; 21 N. W. 495.

In many, if not by far the greater number, of cases treated by a physician, it is absolutely necessary that the physician have a nurse or assistant to aid him in the treatment or examination. This is especially true where the sickness or ailment is serious. Did the legislature intend that the privilege should not extend to those patients whose ailments were so serious as to require a nurse to as-

sist the physician in treating the patient? For if the privilege does not extend to the agent or assistant of the physician who is present at the treatment, then manifestly a third person being present the privilege is waived as to the physician. It is a matter of common knowledge that a great many physicians, more and more each day, refuse to treat a woman unless a nurse is present. How can the surgeon wield the knife without the operating nurses? Is it reasonable to suppose that the legislature intended that privilege should be denied women who were treated by these physicians, and thus the very purpose of the statute "to encourage full and frank disclosures to the medical adviser by relieving the patient from the fear of embarrassing consequences" be defeated? What of those cases where the physician must act through an interpreter? Surely if effect is to be given to the legislative intent and purpose, the agents and assistants of the physician in treating the patient must be held within the privilege. To hold otherwise would be to nullify the purpose of the statute. Paraphrasing the words of Mr. Justice Pitney in Arizona N. & M. R. Co. v. Clark supra: *to construe that act in accordance with the contention of Plaintiff in Error would render it inapplicable in all cases where the physician requires the aid of an agent or assistant in treating the patient. This would deprive the privilege of the greater part of its value, by confining its enjoyment to the comparatively rare and unimportant instances where a nurse or as-*

sistant is not necessary to aid the physician in treating the patient. As the United States Supreme Court said in the Clark case, we believe this Court will say: "We are constrained to reject this construction."

Assignment of Error No. VI.

Dr. Robert C. Buck was appointed by the Court to examine the plaintiff under the provision of Chapter 30, Session Laws of Arizona, 1923. He testified that he was not employed by either the plaintiff or defendant. It is here claimed that the trial court erred in sustaining the objection of the Defendant in Error to the offer of the Plaintiff in Error to prove that Dr. Robert Buck was appointed by the court under Chapter 30, Session Laws of Arizona, 1923, page 102. This assignment is not well taken for the reason that it does not appear by the Bill of Exceptions that Dr. Buck was asked such a question; nor that, if it was, an objection was made and sustained to the question and an exception noted. In other words, there is nothing in the record upon which to base this Assignment of Error.

As to the merits, Plaintiff in Error says: "Under the familiar rule of evidence, that interest or lack of interest, or the bias or prejudice of the witness may be shown, we feel that the trial court erred". (Brief, page 28.) If there is a "familiar rule of evidence" that lack of interest or bias may be

shown when the credibility of the witness *has not been attacked* we have failed to discover it in the works of the numerous authors on evidence. The true rule is that a witness is presumed to speak the truth, and evidence *cannot* be introduced to sustain the credibility of a witness *who has not been impeached.*

40 Cyc. 2555 and cases cited, notes 42-43;

Central Vt. Ry. Co. v. Cauble, 228 Fed. 876;

Hanks v. Yellow Cab & Bag. Co. (Kan.), 209 Pac. 977;

Ellis v. Central Cal. Tract. Co. (Colo.), 174 Pac. 407.

Here the credibility of the witness, Dr. Buck, was never attacked, and evidence was inadmissible to show his credibility, and we most earnestly contend it would be giving undue weight to his testimony to have permitted the question if asked.

Assignment of Error No. VII.

Error is here assigned to the trial court sustaining the objection of the Defendant in Error to the question asked Dr. Bakes testifying as a witness for Defendant in Error:

> "You make it a habit of appearing for the plaintiff in these personal cases?"

the offer being made, as stated by counsel, for the purpose of showing interest. Interest as used with reference to the credibility of witnesses means a

personal interest in the subject matter or result of the action. The fact that the witness has testified for the plaintiffs in any number of like cases can in no way show that he has an interest in the result of the particular action. Nor is it evidence of bias or prejudice in this particular case. He testified he was employed by this plaintiff. The fact that he had been employed by other plaintiffs against other defendants could be no evidence that he was biased or prejudiced as to the parties to this action.

C. & E. I. R. Co. v. Schmitz, 211 Ill. 446; 71 N. E. 1050;

Chicago City Ry. Co. v. Smith, 226 Ill. 178; 80 N. E. 716;

St. L. I. M. & S. R. Co. v. McMichael (Ark.), 171 S. W. 115.

Assignment of Error No. VIII.

Plaintiff in Error assigns as error the order of the trial court in permitting the plaintiff, over the objection of defendant, to offer in evidence the testimony of Dr. Bakes as to plaintiff suffering with "industrial blindness". The contention of the plaintiff in error seems to be that the complaint alleges total and permanent disability, and therefore evidence of anything less than absolute blindness is inadmissible. We are at a loss to understand what the argument, if such it may be called, of Plaintiff in Error is on this assignment. Reference is made to the pleadings and to Sections 3154 and 3158,

Civil Code of Arizona, but without attempting to show the application thereof. Possibly, plaintiff in error was as unable as we to see the application. The damages recoverable under the Arizona Employers' Liability Law are, such as will compensate for the loss caused by the accident and injury. Ariz. Copper Co. v. Burciaga, 20 Ariz. 85; 177 Pac. 29. *Impairment* of earning capacity may be shown under an averment of permanent disability.

17 C. J. 1016, par. 313;

Terre Haute Elec. Co. v. Watson, 33 Ind. A. 124; 70 N. E. 993;

Bayles vs. Savery Hotel Co., 148 Ia. 29; 126 N. W. 808;

Tex. Etc. R. Co. v. Elliot (Tex.), 189 S. W. 737;

Shimmin v. Mining Co. (Mo.), 187 S. W. 76.

Assignments of Error Nos. IX and X.

Plaintiff in Error had offered the testimony of Doctor Buck and Mr. Culp as to the present condition of the left eye of Defendant in Error, and the cause thereof. Each had qualified as experts and testified as to his opinion regarding the condition of the eye. Plaintiff in Error then called Dr. Vivian and Dr. Gotterdam, each of whom stated he had heard the testimony of Dr. Buck and Mr. Culp. Each was asked, assuming the facts as testified to

by Dr. Buck and Mr. Culp to be true, what, in his opinion, was the present condition of plaintiff's eye and cause thereof. It is true that in some jurisdiction to economize time, experts may be examined "on the evidence", but even in those jurisdictions it is discretionary with the trial court, it being recognized that reason is against such a rule.

22 C. J. 717.

But by the weight of authority and in the Federal Courts this practice is condemned and disallowed. Mfrs. Acc. Ind. Co. v. Dorgan, 58 Fed. 945, by Judge Taft:

> "The question was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witness tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based."

And see 22 C. J. 718, par. 807.

There is absolutely no authority which will permit an expert to express an opinion based on evidence which includes the *opinion of other experts*, as here.

2 Jones Com. Evid. 916;
22 C. J. 718;
11 R. C. L. 582;
18 A. L. R. 106;
8 A. L. R. 1316;
29 L. R. A. (N. S.) 537.

Assignments of Error Nos. XI, XII, XIII, XIV, XV and XVI.

The only question raised under these assignments is as to the sufficiency of the evidence to support the verdict. Naturally, we feel that the jury should have given the Defendant in Error a larger verdict and do not argue with Plaintiff in Error as to that. And we say that the contention of Plaintiff in Error that there is no evidence to support this verdict is ridiculous and frivolous in the extreme. The testimony of the plaintiff, Gomez, and the witness, Francisco Lopez, is uncontradicted that on the 13th day of June, 1923, the plaintiff was employed by the defendant as a miner in defendant's mine; that while picking rock in said mine a piece of rock struck plaintiff's eye. This evidence is undisputed. (Trans. of Rec. p. 36, 42). But plaintiff in Error says there is no evidence of damage. Defendant in Error, Gomez, testified that there was nothing wrong with his eyes before he was hurt on June 13, 1923. That he could see perfectly before then. That the rock struck him in the center of the left eye, and that it caused him pain and interfered

with his vision. That now his eye is cloudy and he cannot see out of it, and has been that way since the accident of June 13, 1923. (Trans. of Rec. p. 37.) Dr. Bakes testified that he examined the plaintiff on July 23, 1923, and found a corneal scar on the center of the cornea of the left eye almost completely filling the pupilary area. The scar was on the outside surface of the cornea. His condition was an ulcerative ceratatis, and syphilis had absolutely nothing to do with it. (Defendant contended eye condition was caused by syphilis.) (Trans. of Rec. pages 54 and 57.) That is our answer to the challenge of Plaintiff in Error that we point out any condition to sustain the verdict. If more is asked, we point to Plaintiff's Exhibit No. 1 (Trans. of Rec., page 20), the hospital card from defendant's hospital on which Dr. Franklin states plaintiff has a cornea ulcer; not interstitial ceratatis or syphilitic infection, as defendant contended.

A Federal Court of error cannot set aside the verdict of a jury in an action at common law as against the weight of the evidence, when there was any evidence in support thereof.

Foster Fed. Prac., Vol. 4, page 3884;

Wilson v. Everett, 139 U. S. 616; 35 L. Ed. 286;

R. R. Co. v. Winter's Adm. 143 U. S. 60; 36 L. Ed. 71;

Hamilton Inv. Co. Bollman, 268 Fed. 788;

Same case, 255 U. S. 571; 65 L. Ed. 791.

In conclusion we respectfully submit that the assignments of error, and each of them, are without merit, and the judgment and order appealed from should be affirmed.

Respectfully submitted,

F. C. STRUCKMEYER,
I. A. JENNINGS,
C. L. STROUSS,
D. A. FRASER,
Attorneys for Defendant in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHWEST METALS COMPANY, a corporation, Plaintiff in Error,	
vs.	No.4445
FRANCISCO GOMEZ, Defendant in Error.	

Upon Writ of Error to the United States District Court of the District of Arizona.

ADDITIONAL POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR

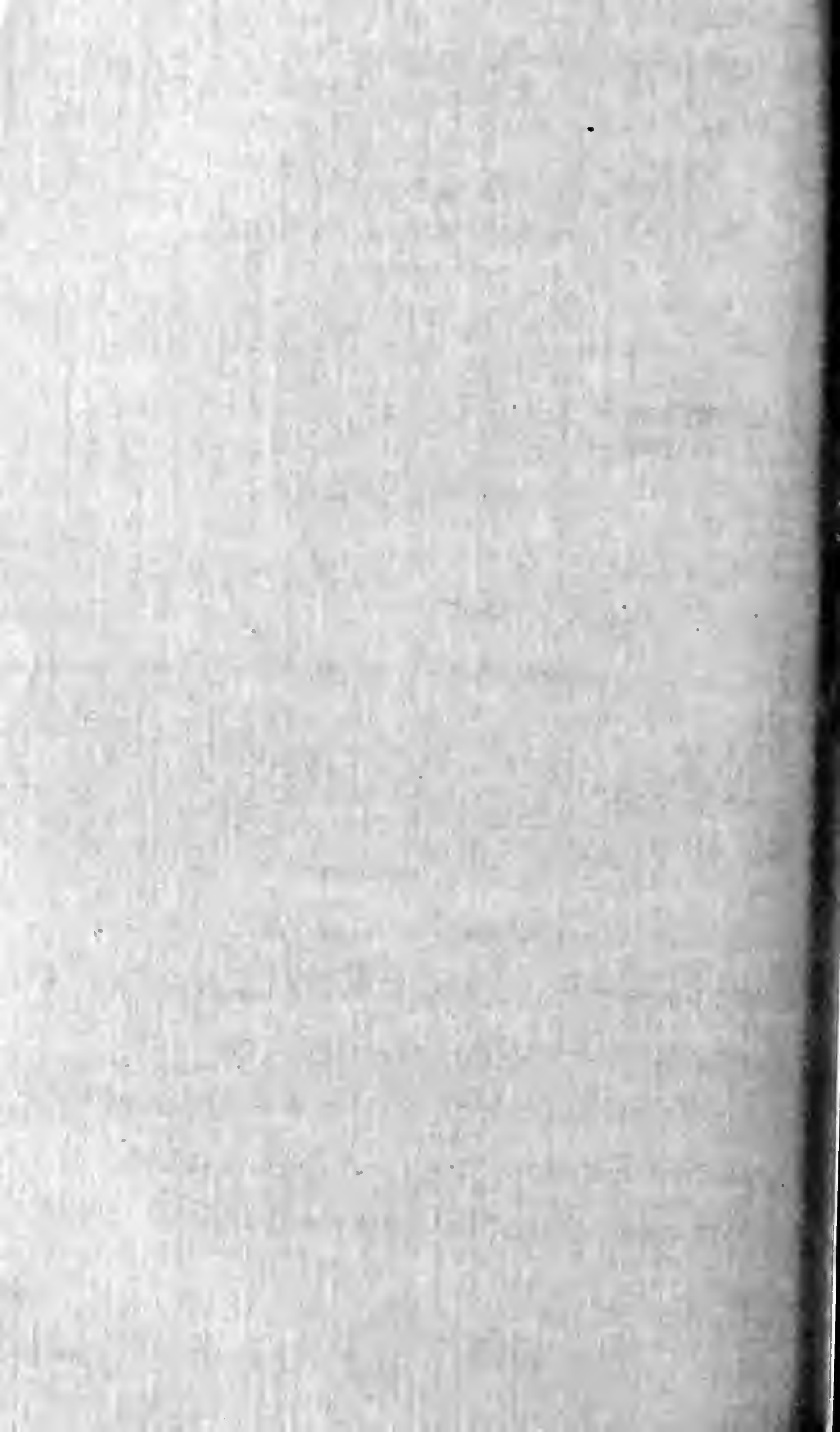
ANDERSON, GALE & MILLER
Attorneys for Plaintiff in Error

Filed this ____ day of ____________, 1925.

FRANK D. MONCKTON
Clerk

By ______________________
Deputy Clerk

FILED



UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHWEST METALS COMPANY, a Corporation, Plaintiff in Error,	)	
vs.	)	No. 4445
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ADDITIONAL POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR

If it is the wish of the Court, and their pleasure, we would be pleased to have them consider the following points and authorities in reply to defendant's Brief, for the reason that Defendant in Error raised a number of new matters in their Reply.

than a druggist, who fills a prescription, or a massuer, who carries out certain orders of the physician, or a waiter, who carries in the tray of food, acting under the orders of the physician. The mere fact that she is acting under the directions of the physician does not make her an assistant, or his agent, within the law.

Defendant in Error cites Wigmore on Evidence. We are very happy that they did so. This whole question is treated by Wigmore, Second Edition, Volume 5, Sec. 2380, 2381 and 2382. Reference to this was made in our original Brief, and we quote from Paragraph 2382, which does not in any way support Defendant in Error, but we think clearly the opposite:

> "The confidence which is protected is that only which is given to a professional physician during a consultation with a view to a curative

treatment; for it is that relation only which the law desires to facilitate.

(a) Hence, the person consulted must be a professional physician, in the usual sense of the word. This does not include a veterinary surgeon; nor a pharmacist; nor a nurse, or other skilled auxiliary practitioner. Nor does it include a dentist;"

A nurse is not skilled in medicine, as an assistant physician, or as an assistant surgeon. She carries out the orders of the doctor, as to treatment, as to the doing of certain things. There is no confidential relation between the patient and herself, in the sense that the law contemplates.

Counsel for defendant stresses the proposition that we overlooked Paragraph 5551 of the Statutes of Arizona. We were very mindful of this section and made no such contention as stated by counsel, for

a strict construction of our Statute, but to the contrary our statement was:

> "Our statute, being in derrogation of the Common Law, and while liberally construed, it cannot be extended beyond the plain terms of the statute".

We also were mindful of the following section of the Statute of Arizona, to-wit: Paragraph 5552, first section thereof, which provides that words: "which have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning". The words "physician and surgeon" certainly have a peculiar and appropriate meaning in the law, as used in our statute, and therefore must be understood and construed according to that peculiar and appropriate meaning, and such

[illegible] strict [illegible]

[illegible] the contrary [illegible]

> "[illegible], Lewis in [illegible] and which clearly [illegible] [illegible], it [illegible] to [illegible] beyond the plain terms of the statute'.

We also were [illegible]

To [illegible] of the [illegible] Artisans, to-wit: [illegible] first [illegible] therein, which pro-vides that words which have ac-quired a peculiar and appropriate meaning in the law shall be con-strued and understood according to such peculiar and appropriate mean-ing'. The words [illegible] certainly have a peculiar and appropriate meaning in the law, as used in our statute, and there-fore must be construed and con-strued according to that peculiar [illegible]

meaning does not include the word "nurse", or "assistant", or "agent", or "dentist", or "druggist", or any other person, save and except a physician or surgeon.

We also call attention to Section 5555 of the Arizona Code.

II

Defendant in Error takes the position that testimony given on cross-examination by the plaintiff is not voluntary testimony. We think such a proposition is answered by a mere statement as follows: If such testimony is elicited by competent cross-examination, (that is to say, upon matters and things brought out in chief and within the rule as to cross-examination), then it is just as voluntary as if brought out in direct examination. We feel that no authority can be found in support

of any other position than this. To permit a witness to give his story and then not permit competent cross-examination of the matters and things brought out, for the reason that he would be giving involuntary testimony, appears to us as more than ridiculous.

III

Defendant claims that the Egich decision, 22 Arizona, 543, lays down a rule which is adverse to our position in this case. We take the position that the Egich case is a strong authority in favor of our position taken under Assignments No. I and II. While the Arizona Court did disagree with the Supreme Court of the United States, as to inherent risks and hazards, yet they laid down the rule, not only once, but several times, and emphasized

or any other [illegible] than [illegible]

is material [illegible] different [illegible]

story and give [illegible] such [illegible]

circumstances [illegible] of the [illegible]

things happened [illegible], for the reason

that he would be giving [illegible]

testimony, as opposed to [illegible]

first [illegible].

III

Defendant claims that the [illegible] decision, 22 Arizona, 543, lays down a rule which is adverse to our position in this case. We take the position that the [illegible] case is a strong authority in favor of our position taken under [illegible] Nos. I and II. While the Arizona Court did disagree with the Supreme Court of the United States, as to inherent rules [illegible] hazards, yet they laid down the rule, not only once, but several times, [illegible]

it, that the liability arose when the injury was caused by an accident due to a condition, or conditions, of the occupation, including all of these accidents, from whatever source, SO LONG AS THE ACCIDENT CAUSING SAID INJURY WAS DUE TO A CONDITION OF THE EMPLOYMENT. The accident must be due to the condition, the injury must be due to the accident. This certainly does not hold that an infection resulting from some other source than a condition of the employment can be recovered under our Employers' Liability Law. This authority supports the position that the employee must allege and prove that the injury was occasioned by the accident and that the accident was occasioned by a condition of the employment. In this connection we desire to call the Court's attention to 58 Federal, page 945 cited by defendant, upon this question, that the infection, not being a result

ll, Ind. [illegible]

the [illegible]

due to a condition, or condition [illegible]

the occupation, [illegible]

accidents, from employment [illegible]

[illegible]

[illegible]

[illegible] The employment [illegible]

to the condition, [illegible]

due to the accident. This certainly

does not hold that an injurious re-

sulting from some other source than

a condition of the employment [illegible]

prescribed under the employer's [illegible]

Law. This [illegible]

within [illegible]

and prove that the injury was [illegible]

by the accident and that the accident

occurred out of a condition of the

In this connection we desire to [illegible]

Court's attention [illegible]

attention [illegible]

defendant is not liable.

We call the Court's particular attention to page 954 of this Opinion, cited by defendant, where the Court says:

> "We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

IV

Defendant cited 25 Arizona, 158, as being a case identical with the present one, upon the question of privileged communication. We call attention to the fact that in the Garcia case, 25 Ariz. 158, the

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]:

> [illegible] of the [illegible] in the [illegible], [illegible] within the [illegible] of the [illegible], if the [illegible] death by [illegible], [illegible] what the [illegible] into the water, whether [illegible] or a climbing, the [illegible], each case, would be [illegible] [illegible] and sole cause of the [illegible]-ability or death, unless it be proved that death would have been the result, [illegible]. The [illegible] would be [illegible] the condition; the [illegible] be the [illegible] cause, [illegible]."

VI

[illegible]

[illegible] a [illegible] with the

[illegible]

[illegible]

[illegible]

[illegible]

plaintiff's brother testified to certain things, which they did not permit the doctor to contradict. We place emphasis upon the words "plaintiff's brother", not the plaintiff who had testified, and who, in this case, we seek to contradict. We feel that the distinction is very clear.

V

In support of their position sustaining the lower Court in refusing to permit the hypothetical question to be asked, under our Assignments No. 9 and 10, they cite 58 Federal, 945. A simple reading of this opinion will show that it has no application to the question here involved. This is further borne out by the fact of the citation of this authority in the case of Motey vs. Pickle Marble & Granite Co. 74 Fed.155, upon

the question of opinion evidence.

The real rule is laid down in 11 Ruling Case Law, cited by us in our Opening Brief, but this case is very interesting for the quotation cited upon another phase of this case, and we thank Defendant in Error for calling our attention to it.

VI

We cannot refrain from calling attention to the fact that Defendant in Error believed that the Indiana Supreme Court decided the Homnyack vs. Prudential Insurance Company case, 87 N.E. 769, cited in our original Brief, while in fact it was the New York Court that decided the case, and the New York statute was in question, and we hope they are not as far afield in their ideas of the case as they were as to the source from whence it came.

[illegible]

[illegible]

[illegible] our [illegible] very [illegible] error for similar [illegible]

VI

[illegible] attention to the fact that defendant in error believes that the [illegible] Supreme Court decided the [illegible] was [illegible] case, 47 N.E. 780, cited in our original brief, while in fact it was the New York Court that decided the case, and the New York statute was in question, and we hope they were not as far misled in their [illegible] of the case as they were as to the [illegible].

VII

Defendant in Error labors to show that the credibility of a witness who has not been impeached, cannot be attacked. Certainly, no one contends to the contrary, but we wish to point out there is a great difference between the credibility of a witness and the interest, or lack of interest, and the bias or prejudice of a witness. In practically every jury trial instruction is given to the jury which covers this old familiar rule, to-wit: that the jury has a right to take into consideration the interest, or lack of interest, or the bias or prejudice, if any, shown by each and every witness, the witnesse's knowledge and means of knowledge, etc. This is a very familiar and ancient rule that you have a right to prove that

[illegible] show that the credibility of a wit-
ness who has not been impeached
cannot be attacked. Certainly [illegible]
the weakness is the contrary. I do
wish to point out there is a great
difference between the credibility
of a witness and the interest, or
lack of interest, and the bias or
prejudice of a witness. In prac-
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sideration the interest, or lack of
interest, or the bias or prejudice,
if any, shown by each and every wit-
ness, the witness's knowledge and
means of knowledge, etc. This is
a very familiar and ancient rule
that you have a right to consider [illegible]

a witness has an interest, or a lack of interest, in the subject matter in controversy. This is entirely different from attacking the credibility of a witness. This lack of interest and this interest, we certainly had a right to show.

VIII

They pass by our objection to the testimony of the physician as to occupational blindness, with the statement that impairment of earning capacity may be shown under an allegation of permanent disability. There is no doubt of that but occupational blindness would be prejudicial testimony, as a jury might think that he was unable to do any work. Such occupational blindness is not contemplated under our statute. They have a right to show total disability. They have a right to show impairment

witness is [illegible]

of interest, [illegible]

controversy. This is entirely [illegible]

from attacking the credibility of

witness. This lack of interest [illegible]

this interest, is certainly [illegible]

right to show.

VIII

They next by [illegible] objection [illegible]

the testimony of the physician as

to occupational disability, with the

statement that impairment of earning

capacity may be shown under an allega-

tion of permanent disability. There

is no doubt of that but occupational

disability could be permitted testi-

mony, as a jury might think that he

was unable to do any work. And

occupational disability is not con-

templated under our statute. They

have a right to show total disability.

They have a right to show impairment

but they have no right, in the absence of law relative to industrial or occupational blindness, to bring in such testimony under our law. We feel sure that the Court will understand why this Assignment of Error was made, upon an examination of our statute and the pleadings in the case.

IX

In conclusion we want to call attention to the fact that our privilege statute, as to communications of physicians and surgeons, was taken from the State of Kansas, and under the familiar rule that we should be bound by the construction placed upon the statute by the Courts of the State from whence it was taken, we call attention to the case of

Kansas Ry. vs. Murray
40 Pac. 646

Armstrong vs. Topeka Ry.,
144 Pac. 847

Kansas, first, had a statute identical with ours as it now stands, and the privilege extended to any physical, or supposed physical disease, or any knowledge obtained by personal examination, etc. Later, the legislature of Kansas included the words "defects or injuries", after the word "disease", clearly showing that it was the intention of the legislature, in the first instance, to include disease, only, and not injury. If that construction is adhered to then physicians are not privileged as to any injuries and only as to disease, or supposed disease, but another interesting point would be observed in the construction of this statute by this Court in the Armstrong decision where they hold, (and we direct particular attention to page 850, 144 Pac. par. 3):

"This statute, in its terms, will not be extended by implication, or by interpretation, but will be strictly construed in favor of the COMPETENCY of the witnesses".

Respectfully submitted,

LeRoy Anderson
Alfred H. Gale
Henry H. Miller
Attorneys for Plaintiff in Error

No. 4446

9

United States
Circuit Court of Appeals
For the Ninth Circuit.

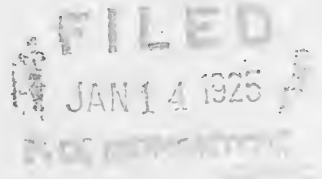
THE UNITED STATES OF AMERICA, Upon the Relation of J. L. FINCH,
Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

J. L. FINCH, Esq., 1026 L. C. Smith Building, Seattle, Washington,
Attorney for Appellant.

THOS. P. REVELLE, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Appellee.

C. T. McKINNEY, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Appellee. [1*]

United States District Court, Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,
Relator,

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,
Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI.

To the Honorable JEREMIAH NETERER, Judge of said Court:

Comes now your relator, J. L. Finch, and petitions and says, to wit:

*Page-number appearing at foot of page of original certified Transcript of Record.

That the respondent H. S. Elliott is now and was during all the times herein mentioned a United States Commissioner for the Western District of the State of Washington; on the 21st day of November, 1924, Earl Corwin, claiming to be and acting as a Federal Prohibition Agent of the state of Washington, appeared before said respondent and made complaint against your relator and others charging a crime was being committed against the United States in violation of the National Prohibition Act and praying that a warrant issue by said respondent for the search of the offices of affiant in Room 1026 in the L. C. Smith Building in the city of Seattle, State of Washington, and of the furniture, safes, receptacles, cabinets, desks and equipment of such offices, and that thereupon, the respondent, exercising judicial functions, but acting wholly in excess of and without his jurisdiction in the premises issued a warrant for the search of the said offices of this affiant, a copy of which said warrant is hereto attached, made a part hereof and to which reference is hereby made for greater particularity of description; your relator says and alleges, that prior to the issuance of said warrant no showing of [2] probable cause, supported by oath or affidavit as required by law was made or shown to respondent, nor were any facts set forth or shown tending to establish the grounds of the application or probable cause for believing that such grounds existed; or any showing made except by affidavits of which Exhibits "A" and "B" attached, are copies. Under and by virtue of the color of

authority conferred upon them by such warrant J. W. Simmons, Walter Justi, W. J. Griffeth and Earl Corwin, claiming to be officers of the United States and empowered to execute said warrant entered the offices of your relator on the 21st day of November, 1924, at Rooms 1025 and 1026 in the L. C. Smith Building, City of Seattle, State of Washington, and against the protests of relator made search of his office and of the safe, desks, furnitures, files, papers and equipment of said office, and took and carried away therefrom certain papers and files which they believed would be of value to them; your relator is now and for more than 20 years last past has been an attorney at law and engaged in the practice of his profession, and the offices aforementioned are the offices he maintains for the practice of his profession, and wherein he has kept valuable memoranda, papers, files, letters, receipts, bills and other papers of importance, some of which belong to him personally, some of which belong to his clients and have been entrusted to his care as an attorney, and others of which are memoranda and papers having to do with his professional matters, and all of which are of more or less confidential nature and of great value to him personally and in the practice of his profession, and many of which are necessary for him in the preparation and conduct of cases now pending in court, or about to be commenced therein; no liquors intoxicating or otherwise were found in his office, nor has any liquor ever been kept in his said office for sale in [3] violation of law or otherwise, and the entire pro-

ceedings brought and now pending before said respondent was brought and is being prosecuted, as affiant verily believes, for no other purpose or intent than to bring about an unlawful and wholly unwarranted search of the office of your relator to obtain papers, memoranda, letters, files and things which might be used by those making such search in the preparation of cases now pending or about to be commenced, and was wholly without any lawful or just purpose and intent, was false, oppressive, concocted in deceit, a subterfuge to gain unlawful advantage and a clear abuse of the process under which such action was taken; a memoranda of the papers and things taken from the office of your relator under such warrant is attached hereto, marked for identification and hereby made a part of this petition. Your relator alleges that if said papers are not impounded under process of this court those who hold the same under such warrant will make unlawful use thereof and of the contents thereof, to the great and irreparable harm of this relator. That your relator is without any plain, speedy or adequate remedy in the ordinary course of law and there is no appeal, and your relator says further in this regard, that it has been the practice in all matters of similar nature prosecuted before said respondent for the respondent to be guided wholly by the desires and request of the officers of the Prohibition Department and to defer in all things to such desires of such officers, regardless of the legal rules and practice provided by law for proceedings of such nature; that returns

to such search-warrants are not made as required by law but that the officers making such searches unlawfully withhold their returns to such warrants for unreasonable and wholly unjustified periods of time, and that your relator has reason to believe and does believe that in the instant matter no return will be made [4] to such warrant within the time prescribed by law, or within any time within reason; that no hearing of a motion to quash said warrant, or of the facts or bases for the issuance of such warrant if controverted before said respondent, could or would be heard before said respondent within such period of time as would prevent irreparable injury to your relator being done.

Wherefore your relator prays, that a writ issue to the end and purpose that a review of all proceedings had before said respondent in the premises be made, and that a time and place be fixed in said writ for the return of all such proceedings to this court and for a hearing thereon, and that on such hearing such relief be granted as to this court may seem meet and proper in the premises. And your relator further prays that said writ direct and order that pending a hearing on such return all proceedings before the respondent upon such matter be stayed, and further direct that all papers, books, files, letters, receipts, memoranda, and other things taken and seized under such search-warrant be forthwith delivered up to the Marshal or Clerk of this Court or such other custodian as may be named in said writ so to be im-

pounded until final order be made herein, and further order and restrain that until such final determination be made in the premises, all officers, agents and persons whomsoever into whose hands the said papers, files, memoranda and other things so taken and seized under such warrant have come desist and refrain from disclosing or in anywise making use of any knowledge, information or thing learned from any examination thereof by them made. And that your relator may have such other and further relief as may seem meet and proper in the premises according to equity.

J. L. FINCH,
Attorney *in Propria Persona,*
1026 L. C. Smith Building,
Seattle, Washington. [5]

State of Washington,
County of King,—ss.

J. L. Finch, being first duly sworn on oath deposes and says that he is the relator named in the foregoing petition; that he has read the foregoing petition, knows the contents thereof and that the matters and things therein alleged are true.

J. L. FINCH.

Subscribed and sworn to before me this 25 day of November, 1924.

[Seal] MARY L. WHITE,
Notary Public for the State of Washington Residing at Seattle.

The foregoing petition having been this day presented and considered IT IS ORDERED that a

writ issue under the seal of this court directed to the respondent, H. S. Elliott, a United States Commissioner, for the Western District of Washington, directing and requiring that the respondent make return to this Court as provided by law on or before the —— day of ————, 1924, at the opening of court on said day of all proceedings had, done and taken by and before him in the matter of a certain search-warrant issued by him on the 21st day of November, 1924, under seal on complaint of Earl Corwin against Jerry Finch and others wherein was directed to be made a search of the premises known and described therein as 1026 L. C. Smith Building, Seattle, Washington, and that hearing on such return be had on the —— day of ————, 1924, and that pending final determination of such matter by this Court all further proceedings therein before such respondent be stayed; that all persons whomsoever to who knowledge of the issuance of said writ may come and in particular all persons having in their hands the said search-warrant or anything of whatsoever nature seized, taken or held thereunder, [6] forthwith surrender the same to ———— to be kept and impounded until further order of this Court herein, and further that any and all persons into whose hands the said things so taken under said warrant may have come or who have gained or received knowledge of the contents of the papers and other things taken under such warrant, since the same were taken thereunder, be

restrained and they will be restrained from using, disclosing, communicating, or permitting the use, disclosure or communication of any matter or thing learned, or which might or could have been learned from an examination of the papers and other things so taken under said search-warrant.

Dated this —— day of November, 1924.

————————————,

Judge. [7]

EXHIBIT "A."

United States of America, Western District of Washington, Northern Division.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT.

Earl Corwin, being first duly sworn, on his oath, deposes and says:

That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress was and is being committed, in this, that in the City of Seattle, County of King, State of Washington, and within the said District of Washington, and Division above named, one Jerry Finch, Roy Olmstead, Dick Elbro, Herb Fletcher, Ed. McInnis, W. J. Symonds, C. S. Green, proprietors and their employees on the 17th day of November, 1924, and thereafter was, and is, possessing, and selling intoxicating liquor, all for beverage purposes; and that in addition thereto

affiant states that said premises are not a *dwel-* nor a private residence, and that affiant has heard each of said above persons state that said premises were their office and that affiant submits the attached affidavit and incorporates the same herein; all on the premises described as Room 1026 L. C. Smith Building and connecting rooms, Seattle Washington, including all furniture, safes, receptacles, cabinets, desks and equipment and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties; all being in the County of King, State of Washington and in said District; ALL in violation of the Statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, the said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said District, and his deputies, and to any Federal Prohibition [8] officer *of* Agent, or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said above-named persons, and the premises above described, and seizure of any and all of the above described property and intoxicating liquor, materials, containers, papers and means of committing the crime aforesaid, all as provided by law and said Act.

EARL CORWIN.

Subscribed and sworn to before me this 21st day of November, 1924.

H. S. ELLIOTT,
United States Commissioner, Western District of Washington.

EXHIBIT "B."

United States of America,
Western District of Washington,
Northern Division,—ss.

SUPPORTING AFFIDAVIT.

Earl Corwin, being first duly sworn, on his oath, deposes and says:

That on the 12th day of July, 1924, in the City of Seattle, County of King, State of Washington affiant heard Jerry Finch state that he had intoxicating liquor in said premises at 1026 L. C. Smith Building, Seattle, Washington, and has heard said Finch make the same statement on one or more times each month in August and September, 1924, and has heard said Finch order intoxicating liquor very recently to be sent to said premises and has heard said Finch and Olmstead, Fletcher arrange at said premises for the traffic of intoxicating liquor and said parties state that the books and documents relating to the said intoxicating liquor were in said premises and that some of said conversations were held within less than thirty days last past, and that affiant has heard some of the above parties make arrangements with reputed bootleggers to meet and transact [9] business in said

above premises relating to the sale, transportation and possession of intoxicating liquor.

EARL CORWIN. (Signature)

Subscribed and sworn to before me this 21st day of November, 1924.

H. S. ELLIOTT,

United States Commissioner, Western District of Wash. [10]

SEARCH-WARRANT.

Local Form No. 103.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States to the Marshal of the United States for the Western District of Washington, and His Deputies, or Either of Them, and to any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or Any Federal Prohibition Agent of Said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents, or Inspectors, GREETING:

WHEREAS, EARL CORWIN, a Federal Prohibition Agent of the State of Washington, has this day made application for a search-warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington, charging that a crime is being committed against

the United States in violation of the NATIONAL PROHIBITION ACT of Congress by one JERRY FINCH, ROY OLMSTEAD, DICK ELBRO, HERB FLETCHER, ED McINNIS, W. J. SYMONDS, C. S. GREEN, proprietors and their employees who was, on the 17th day of November, 1924, and is at said time and place, possessing, and selling intoxicating liquor, all for beverage purposes, on certain premises in the City of Seattle, County of King, State of Washington, and in said District, more fully described as Room 1026 L. C. Smith Building and connecting rooms, Seattle, Washington, including all furniture, safes, receptacles, cabinets, desks and equipment and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties:

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and [11] *and* empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary in the daytime, or night-time, and then and there diligently investigate and search the same and into and concerninig said crime, and to search the person of said above named persons, and from him or her, or from said premises seize any and all of the property, documents, papers and materials so

used in or about the commission of said crime; and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 21st day of November, 1924.

[Comm. Seal] H. S. ELLIOTT,
United States Commissioner, Western District of Wash. [12]

November 21, 1924.

RECEIVED OF J. L. Finch the following papers;

Receipt from First Nat. Bank of Snohomish for $60. Dated Sept. 26.

Copy of Letter, Burns Poe, July 2.

Letter from Poe Dated July 1.

Receipt for payment of Income Tax, No. 301300.

Dup. Income Tax Report.

Copy of letter from Ralph Viele et ux, Dated May 20.

Abstract of Title No. 110795.

Copy of Letter to Dow, Re "Elsie," July 17, 1924.

Receipt of Co. Auditor Oct. 28, '24, Covering instruments 1934246 & 1934247.

Copy of letter with Receipt attached, First Nat. Bank of Snohomish, Dated Sept. 25.

File No. 112.

Same taken under Search-warrant Dated Nov. 21, 1924, from H. S. Elliott.

EARL CORWIN,
Federal Prohibition Agent.

TAKEN FROM ROLL-TOP DESK:

1 envelope containing water bill from City Water Dept. to Phillip G. Kinzer, dated May 29, 1924.

1 Memorandum marked Exhibit "L" by Mr. Finch.

Letter from Wilbur E. Dow to Mr. J. L. Finch, dated Nov. 19, 1924.

1 Warranty deed from Phillip G. Kinzer & Claranelle N. Kinzer, dated Sept. 28, 1923.

1 Quitclaim Deed from Roy Olmstead to Elise Olmstead, Dated Nov. 17, 1924.

TAKEN FROM DRAWER 4-K-B-14:

1 Memorandum marked by J. L. Finch as Exhibit "H."

1 Memorandum marked by J. L. Finch as Exhibit "I."

1 Water dept. receipt for 3757 Ridgeway Pl. Marked by J. L. Finch as Exhibit "J."

The above list of papers taken by me this day by virtue of Search-Warrant dated Nov. 21, 1924, from H. S. Elliott.

Nov. 21, 1924.

EARL CORWIN,
Federal Prohibition Agent. [13]

DRAWER 4-K-B-14:

1 Bill to P. L. Graignic dated June 2d, 1924.

1 Roll of bills to P. L. Graignic, 1st date being May 17, 1924.

1 Bdl. bills to P. L. Graignic 1st bill being dated May 10, 1924.

1 List marked by J. L. Finch as Exhibit "A."
1 list marked by J. L. Finch as Exhibit "B."
1 memorandum marked by J. L. Finch as Exhibit "C."
1 Memorandum marked by J. L. Finch as Exhibit "D."
1 Memorandum Marked by J. L. Finch as Exhibit "E."
1 Memorandum marked by J. L. Finch as Exhibit "F."
1 Memorandum Marked by J. L. Finch as Exhibit "G."

TAKEN FROM DRAWER 4–K–B–18:
1 envelope containing papers marked by J. L. Finch as Exhibit "K."
1 Bill of Sale Eckman to Hubbard.

TAKEN FROM LARGE MIDDLE DRAWER:
1 Quitclaim deed Sallie Olmstead to Elise Olmstead.
1 Quitclaim deed Michael Donovan to Elise Olmstead.

The above list of papers taken by me this day by virtue of Search-warrant dated Nov. 21, 1924, from H. S. Elliott.

EARL CORWIN,
Federal Prohibition Agent.

TAKEN FROM RECEIPT FILE ON TOP OF SAFE:
Telephone bills for months of May, June, July, and Sept. 1924.

The above list of papers taken by me this day by

virtue of Search-warrant dated Nov. 21, 1924, from H. S. Elliott.

Nov. 21, 1924.

EARL CORWIN,
Federal Prohibition Agent.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,
Relator,

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,
Respondent.

DECISION.

(On Petition of J. L. Finch.)

Filed Dec. 11, 1924.

The relator prays:

> " * * that a writ issue to the end and purpose that a review of proceedings had before said respondent in the premises be made * * ; that pending the hearing on such re-

turn all proceedings before the respondent upon such matter be stayed, and further direct that all papers, books, files, letters, receipts, memoranda, and other things taken and seized under such search-warrant, be forthwith delivered up to the Marshal or Clerk of this court or such other custodian as may be named in said writ, so to be impounded until final order be made herein * * ; that until such final determination be made in the premises all officers, agents and persons whomsoever into whose hands the said papers, files, memoranda and other things so taken and seized under such search-warrant have come, desist and refrain from disclosing or in anywise making use of any knowledge, information, or thing learned from any examination thereof by them made. * * ''

The amended petition states in substance:

''That the respondent H. S. Elliott is now and was during all the times herein mentioned a United States Commissioner for the Western District of the State of Washington; on the 21st day of November, 1924, Earl Corwin, claiming to be and acting as a Federal Prohibition Agent of the State of Washington, appeared before said respondent and made complaint against the relator and others, charging a crime was being committed against the United States in violation of the National Prohibition Act and praying that a warrant issue by said respondent for the search of the offices of affi-

ant in Room 1026 in the L. C. Smith Building * * and of the furniture, safes, receptacles, cabinets, desks and equipment of such offices * * ; that prior to the issuance of such warrant no showing of probable [15] cause * * was made or shown * * , nor were any facts set forth or shown tending to establish the grounds of the application or probable cause * * . Under and by virtue of the color of authority conferred upon them by such warrant J. W. Simmons (and others named), claiming to be officers of the United States empowered to execute said warrant entered the office of the relator * * and against the protest of relator made search * * and took and carried away therefrom certain papers and files * * , some of which belong to him personally, some of which belong to his clients and have been entrusted to his care as an attorney * * all of which are of more or less confidential nature and of great value to him personally and in the practice of his profession, and many of which are necessary for him in the preparation and conduct of cases now pending in court, or about to be commenced therein; * * no liquors, intoxicating or otherwise, were found in his office * * ; that your relator is without any plain, speedy or adequate remedy in the ordinary course of law, and there is no appeal * * ; that your relator has reason to believe and does believe that in the instant matter no return will be made to

such warrant within the time prescribed by law, or within any time within reason; that no hearing of a motion to quash said warrant, or of the facts or bases for the issuance of such warrant if controverted before said respondent, could or would be heard before said respondent within such period of time as would prevent irreparable injury to your relator being done."

Upon the filing of the amended petition the Court set the matter for hearing, at which time the relator appeared in his own behalf and the respondent represented by the United States Attorney.

It is contended by the relator that this is an original proceeding to stay and supersede the proceedings before the Commissioner. Respondent contends by special appearance that the court is without jurisdiction by Section 10496b C. S., and that the District Judge and Judges of state courts of record, and United States commissioners, have the same power to issue search-warrants, and that this Court is without power to review the action of the Commissioner, who has equal powers under this section, and that the Court has no inherent power to review the acts of a ministerial officer of the government, the Commissioner being a ministerial officer of the court and having no judicial power, and that issuance of a search-warrant is not a judicial function.

J. L. FINCH, Esq., Relator, of Seattle, Wash., *in propria persona.*

C. T. McKINNEY, Esq., Asst. U. S. Attorney, of Seattle, Wash., Attorney for Respondent.

JEREMIAH NETERER, District Judge:

The relator invokes the original jurisdiction and "prays a writ of certiorari," an order of injunction against persons not parties to this action, and the impounding of papers, etc., seized under a search-warrant [16] issued by the respondent, "a United States Commissioner," and alleged to be in possession of the parties who executed the warrant.

Certiorari is a writ having several purposes; one to enable a Court of reviewing power to examine the action of an inferior court; another is to enable the Court to get further information in an action then pending before it for adjudication. L. M. A. & C. R. Co. vs. L. T. Co., 78 Fed. 659. It is a proceeding appellate in the sense that it involves a limited review of the proceedings of an inferior jurisdiction,—Basanat vs. City of Jacksonville, 18 Fla. 529; and lies only to inferior courts and officers exercising judicial powers, and is directed to the Court, magistrate, or board exercising such powers, requiring the certification of the record in a matter already terminated. People vs. Walter, 68 N. Y. 403; People vs. Livingston County, 43 Barb. 232. Its function is not to restrain or prohibit, but to annul. Gault vs. City and County of S. F., 122 Cal. 18 (54 Pac. 272). It is a revisory remedy for the correction of errors of law apparent upon the rec-

ord, and will not lie where there is another remedy except for want of jurisdiction. Farmington River & Waterpower Co. vs. Co. Commrs., 112 Mass. 206; La Mar vs. Co. Commrs. etc., 21 Ala. 772; Thompson vs. Reed, 29 Iowa, 117; Memphis & C. R. Co. vs. Brannum, 11 So. 468 (96 Ala.); McAloon vs. License Commrs. etc., 46 Atl. 1047; Saunders vs. Sioux City Nursery Co., 24 Pac. 532 (6 Utah). The scope of the writ has been enlarged so as to serve the office of a writ of error. Degge vs. Hitchcock, 229 U. S. 162. If this Court has power to issue the writ sought, it obviously could not, in this, an original proceeding against the respondent, "a United States Commissioner * * ," enjoin strangers to this action,—U. S. vs. Maresca, 266 Fed. 713,—or require parties not before the Court even though the warrant was issued to, and executed by them, to surrender and deliver up property taken, nor direct an officer of this court to pursue such parties and take from their possession documents, evidentiary or otherwise, which may have been wrongfully taken.

The Court, no doubt, has power to supervise the conduct of its officers,—Griffin vs. Thompson, 43 U. S. 241,—and a United States Commissioner, while not strictly an officer of the court, may to a degree be subject to its supervisory control. U. S. vs. Allred, 155 U. S. 591. His powers grew from authority to take oaths and acknowledgments to that of an examining and committing magistrate,—Sec. 1014, Rev. Stats.; U. S. vs. Devers, 125 Fed. 778; Todd vs. U. S., 158 U. S. 278,—and while so

acting, discharged judicial functions and had "no divided responsibility with any other officer of the government," U. S. vs. Schuman, #16237 Fed. Cases; U. S. vs. Devers, *supra.* He performed *quasi*-judicial functions and possessed such powers as were especially conferred. U. S. vs. Tom Wah, 160 Fed. 207. He has no power to punish for contempt. Ex parte Perkins, 29 Fed. 900; In re Perkins, 100 Fed. 950 at 954. The Espionage Act confers special powers in providing for the issuance of search-warrants and prescribes the procedure with relation thereto.

Sec. 10496¼a, Comp. Stats.—"A search-warrant * * may be * * issued by a judge of the United States District Court or * * by a United States Commissioner * * ."

Sec. 10496¼e: "It cannot be issued but upon probable cause, supported by affidavit * * ."

Sec. 10496¼f: "If the * * commissioner is satisfied of the existence of grounds * * he must issue a search-warrant * * [17] stating the probable cause * * ."

Section 10496¼k: "A search-warrant must be executed and returned to the * * Commissioner who issued it within ten days * * ; after * * this time * * unless executed (it) is void."

Section 10496¼o: "If the grounds * * be controverted * * the Commissioner must proceed to take testimony * * ."

Section 10496¼p: "If it appears that the property or paper taken is not the same as that

prescribed in the warrant or that there was no probable cause * * the * * commissioner must cause it to be restored to the person from whom taken * * ."

Section 10496¼q: "The * * commissioner must annex the affidavits, search-warrant, return, inventory and evidence * * and * * at once file the same, together with a copy of the record of his proceedings, with the Clerk of the court * * ."

It is obvious that a complete procedure is provided. No supervisory power or appellate jurisdiction is given to the District Judge. If the Court may review, it must be because of inherent power. The power of the commissioner of the issuance of a search-warrant is equal to that of the District Judge. The power of each emenates from a common source. The Congress has the power "to constitute tribunals inferior to the Supreme Court." U. S. Constitution, Art. 1, Sec. 8, Clause 9; Art. 3, Sec. 1. The power to create implies the power to limit the jurisdiction. U. S. vs. Hudson, 11 U. S. 32 (7 Cranch). The Federal court is of limited jurisdiction, and has no power except such as is expressly granted or necessarily implied. Turner vs. Bank of N. A., 4 Dell. 9. Within this limitation it is a court of general jurisdiction. Toledo S. L. & W. R. Co. vs. Peruchie, 205 Fed. 472. The District Courts have power to issue writs not especially provided for by statute which may be necessary for the exercise of their respective jurisdictions

and agreeable to the usages and principals of law. Comp. Stats., sec. 1239. Rev. Stats. sec. 716.

Can a District Judge, without statutory authority "agreeable to the usages and principals of law" by *certiorari* review "a search-warrant" proceeding of a United States Commissioner, who is given equal power by the Congress? If so, can one District Judge review the act of another District Judge in like manner? It is plain, however, that the Commissioner proceedings have not been concluded and that the relator has not exhausted his remedy before the Commissioner.

The office and history of a United States Commissioner is clearly given by Judge Hough in U. S. vs. Maresca, *supra.* While the Court has the right to issue the writ,—In Re Chetwood, 165 U. S. at 462, Judge Hough in U. S. vs. Maresca, [18] *supra,* said:

> "It does not follow that a *certiorari* must issue, and as against a magistrate exercising only arresting and committing powers it ought not to issue, and unless imposed by statute cannot issue under customary law, as is well and I think conclusively shown by Hagie, J., in Farrow vs. Springer, 57 N. J. Law, 553 (31 Atl. 215).
>
> There is no statutory imposition of that remedy by Congress, and therefore, in my opinion, it does not exist in this matter."

He also held that a United States Commissioner, under the present law, in issuing a search-warrant exercised the powers of the District Court

(10496¼a, *supra*), and while so acting, "was sitting in the District Court" and the law seems to so read. He also said at page 723:

> "The view that this entire matter of issuing a search-warrant and then directing the return of what was seized thereunder is a district court's proceeding, is confirmed by study of the nature and history of the case reported as Veeder vs. United States, 252 Fed. 414" (*certiorari* refused 246 U. S. 675).

—and that a writ of error would lie to the Circuit Court of Appeals from the Commissioner's act, and denied the motion to return property taken because the proceeding:—

> " * * was in the district court by a judicial officer, subordinate, but independent, sitting as a committing magistrate, having equal power with any Judge authorized to hold a District Court."

Judge Hand in U. S. vs. Casino, 286 Fed. 976 at 979, after referring to U. S. vs. Maresca, *supra,* held that the United States Commissioner, in issuing a search-warrant, acted in a ministerial capacity, and the writ would be improper and at page 981 said:

> "It is clear that *certiorari,* assuming that this court has power in a proper case to issue that writ (citing cases) is not necessary, and indeed, if the action of the commissioner be not judicial, the common-law writ, which is all that could go in any event, would be improper."

The writ, if this Court has power to issue it, is not necessary, and in my opinion would be improper. Plaintiff relator has other adequate remedy.

From any viewpoint of approach the petition must be denied.

NETERER,
United States District Judge.

Note: See also Bates vs. Payne, 194 U. S. 106; Marquiz vs. Friabie, 101 U. S. 473; In re 1169 Myrtle Ave., 288 Fed. 384; In re Alpern, 280 Fed. 435; U. S. vs. Roman, 253 Fed. 814; U. S. vs. Berry, 4 Fed. 779; The Mary, 233 Fed. 121 (decision by the writer). [19]

[Endorsed]: Filed in the United States District Court, Western District of Washington. Northern Division. Dec. 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,
Relator,

versus

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,
Respondent.

ORDER DENYING WRIT OF CERTIORARI.

And now the Court having heretofore on the 11th day of December, 1924, filed herein its written opinion ordering and adjudging that relator's petition for writ of certiorari should be denied,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the petition of the relator in the above-entitled cause, petitioning the Court for a writ of certiorari to review certain proceedings had before H. S. Elliott, a United States Commissioner for the Western District of Washington, be and the same hereby is denied, to which ruling of the Court the relator excepts and his exceptions are by the Court allowed.

Dated, Dec. 20, 1924.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,

Relator and Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner, for the Western District of Washington,

Respondent and Appellee.

PETITION FOR APPEAL.

To the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division:

The above-named relator feeling himself aggrieved by the order made and entered in this cause on the 20th day of December, 1924, does hereby appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and he prays that his appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco in the State of California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

J. L. FINCH,
Solicitor *in pro. per.*

Petition for appeal granted, and the appeal allowed, upon giving bond, conditioned as required by law, in the sum of Five Hundred Dollars.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

United States District Court for Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,
Relator and Appellant,
vs.
H. S. ELLIOTT, a United States Commissioner, for the Western District of Washington,
Respondent and Appellee.

ASSIGNMENT OF ERRORS.

Now comes, The United States of America, upon the relation of J. L. Finch, relator and appellant,

in the above-entitled cause, and in connection with his petition for appeal in this cause assigns the following errors, which appellant avers occurred therein, and upon which he relies to reverse the judgment entered herein, as appears of record:

1. The Court erred in denying the petition filed in this cause.

2. The Court erred in not granting a writ of certiorari in this cause.

3. The Court erred in not granting a writ of certiorari, with ancillary orders of supersedeas, in this cause.

4. The Court erred in not granting the relief prayed for in this cause.

5. The Court erred in not granting any relief in conformity with the petition in this cause.

WHEREFORE, appellant prays that the judgment of said Court be reversed, and that mandamus issue requiring the Court to grant relator the relief prayed for in his petition.

J. L. FINCH,
Attorney for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,

Relator and Appellant,

versus.

H. S. ELLIOTT, a United States Commissioner, for the Western District of Washington,

Respondent and Appellee.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, J. L. Finch, as principal, and the National Surety Company, a corporation legally organized under the laws of the State of New York and duly authorized to transact a general surety business in the State of Washington, as surety, acknowledge ourselves to be jointly indebted to H. S. Elliott, a United States Commissioner for the Western District of Washington, appellee in the above cause in the sum of $500.00; conditioned that, whereas, on the 20th day of December, 1924, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in that court, wherein the United States of America on the relation of J. L. Finch was relator and H. S. Elliott, a United States Commissioner for the Western District of Washington, was respondent, numbered on the equity docket as No.

9006, an order was rendered against the said United States of America upon the relation of J. L. Finch, and the said United States of America upon the relation of J. L. Finch having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said order and a citation directed to the said H. S. Elliott, a United States Commissioner for the Western District of Washington, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, citing and admonishing them, and each of them, to be and appear at a session [24] of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, in the State of California, within thirty (30) days from the date of said citation.

NOW, if the said United States of America, upon the relation of J. L. Finch, shall prosecute said appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void otherwise to remain in full force and effect.

[Seal] J. L. FINCH,
Principal.

NATIONAL SURETY COMPANY.
By ——————.
Resident Vice-President.

[Seal] Attest: ——————,
Resident Asst. Secretary.

NATIONAL SURETY COMPANY,
By W. L. ATKINSON,
Attorney-in-Fact.

Approved: Dec. 20, 1924.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,
Relator and Appellant,
vs.
H. S. ELLIOTT, a United States Commissioner, for the Western District of Washington,
Respondent and Appellee.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of the record on appeal to the United States Circuit Court of Appeals of the Ninth Circuit in the above-entitled cause and include therein the following:

1. Amended petition for writ of certiorari and for ancillary relief.
2. Appearance of the United States Attorney, if any.

3. Decision of the Court.
4. Order denying writ.
5. Petition for appeal and order allowing same.
6. Assignment of errors.
7. Bond.
8. Citation.
9. This praecipe.

J. L. FINCH,
Attorney for Appellant.

Service acknowledged, Dec. 20, 1924.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed:] Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch. [26]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,

Relator,

vs.

H. S. ELLIOTT, a United States Commissioner, for the Western District of Washington,

Respondent.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 26, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [27]

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 60 folios at 15¢	$9.00
Certificate of Clerk to transcript of record, 4 folios at 15¢..........................	60
Seal to said Certificate......................	20

I hereby certify that the above cost for preparing and certifying record, amounting to $9.80 has been paid to me by attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set *my and* affixed the seal of said Court, in said District, this 22d day of December, 1924.

[Seal] F. M. HARSHBERGER,

Clerk of the United States District Court for the Western District of Washington. [28]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9006.

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH,

Relator and Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner, for the Western District of Washington,

Respondent and Appellee.

CITATION.

United States of America,—ss.

The President of the United States of America, to H. S. Elliott, a United States Commissioner for the Western District of Washington, and

to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby notified that in a certain case in equity in the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America upon the relation of J. L. Finch is relator and H. S. Elliott, a United States Commissioner for the Western District of Washington, is respondent, an appeal has been allowed the relator therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, in the State of California, within thirty (30) days after the date of this citation to show cause, if any there b*y*, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 20th day of December, 1924.

JEREMIAH NETERER,
United States Dist. Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the Dist. Court of the United States for the Western Dist. of Wash., Northern Division.
[29]

Service of the above citation acknowledged this 20th day of December, 1924.

H. S. ELLIOTT,

United States Commissioner Western Dist. of Washington.

THOMAS P. REVELLE,

United States Attorney for the Western Dist. of Washington. [30]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4446. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, upon the Relation of J. L. Finch, Appellant, vs. H. S. Elliott, a United States Commissioner for the Western District of Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 26, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4446

/10

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA, Upon the Relation of J. L. FINCH,

Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,

Appellee.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

J. L. FINCH,

Attorney for Appellant.

1026 L. C. Smith Building,
Seattle, King County, Washington.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE.

FILED
FEB 1 . 1925
F. D. MONCKTON

No. 4446

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA, Upon the Relation of J. L. FINCH,

Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,

Appellee.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

J. L. FINCH,

Attorney for Appellant.

1026 L. C. Smith Building,
Seattle, King County, Washington.

STATEMENT OF THE CASE.

Appeal from a final order of the lower court denying relator's petition for a writ of certiorari.

Relator filed with the lower court his petition for a writ of certiorari in which the following facts were alleged:

Relator is a lawyer, practicing his profession at 1026 L. C. Smith Building, in the City of Seattle. Certain named prohibition agents appearing before respondent, H. S. Elliott, a United States Commissioner for the Western District of Washington, with-out a sufficient showing of "probable cause," obtained from the latter a search warrant alleged to be void in law, under which they proposed to search relator's office for intoxicating liquors. Armed with this search warrant, they made search of such office. They found no intoxicating liquor. But they carried away with them a vast amount of papers, a list of which was appended to the petition. It was further alleged that this search was "wholly without any lawful or just purpose and intent, was false, oppressive, concocted in deceit, a subterfuge to gain unlawful advantage, and a clear abuse of the process under which such action was taken";

that the papers taken "were valuable memoranda, papers, files, letters, receipts, bills and other papers of importance, some of which belonged to him personally, some of which belonged to his clients, and had been entrusted to his care as an attorney, and others of which were memoranda and papers having to do with his professional matters, and all of which were of a more or less confidential nature, and of great value to him personally and to the practice of his profession, and many of which were necessary to him in the preparation and conduct of the cases then pending in court, or about to be commenced therein"; that the search was made "for no other purpose or intent than to bring about an unlawful and wholly unwarranted search of the office of relator to obtain papers, memoranda, letters, files and things which might be used by those making such search in the preparation of cases now pending or about to be commenced." It was further alleged, that if the papers were not impounded under process of the court, those who held the same under such search warrant would make unlawful use thereof, and of the contents thereof, to the great and irreparable harm of relator. It was further alleged "that returns of such search warrants are not made as

required by law, but that the officer making such search unlawfully withhold their return of such warrants for unreasonable and wholly unjustified periods of time, and that relator had reason to believe that in the instant matter no return would be made to such warrant within the time prescribed by law, or within any time within reason, and that no hearing before the commissioner controverting the basis for the issuance of said warrant could or would be had within such period of time as to prevent irreparable injury to relator"; that relator was without any plain, speedy or adequate remedy in the ordinary course of law, and that there was no appeal to be had from any proceedings before such commissioner. Relator prayed, inter alia, that a writ issue to the end and purpose that a review of all proceedings before the commissioner be made, and a time be fixed in the writ for the return of all such proceedings, and for a hearing thereon, and that on such hearing such relief be granted as to the court might seem meet and proper in the premises. Relator also prayed, that a writ issue ordering and directing that, pending such hearing, the papers be impounded with the Marshal or Clerk of the Court; further, that an order issue restraining all officers,

agents, and persons whomsoever, into whose hands said papers had come, from making any use thereof, or of any knowledge or information gained therefrom. (Transcript, pages 2, 3, 4, 5 and 6).

Upon presentation of this petition the court invited the United States Attorney to appear therein, that the court might have the benefit of argument.

After hearing had, the court filed his decision denying relator any relief. (Transcript, p. 16, *et seq.*).

Subsequently, a formal order was entered in accordance with the decision of the court. (Transcript, p. 27).

From this order denying relief, relator has appealed to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in denying the petition filed in this cause.

2. The court erred in not granting a writ of certiorari in this cause.

3. The court erred in not granting a writ of certiorari, with ancillary orders of supersedeas, in this cause.

4. The court erred in not granting the relief prayed for in this cause.

5. The court erred in not granting any relief in conformity with the petition in this cause.

ARGUMENT.

This is a case without exact parallel in the books. Circumstances crying out for immediate relief made it necessary that relator employ, or attempt to employ, remedies seldom, if ever, employed in the manner attempted. Nevertheless, relator feels the proceeding was justified upon principle, and that the lower court erred in refusing him its aid.

A better understanding of our theory may be had if first the situation be presented nakedly. Relator is a lawyer practicing his profession after the manner of all lawyers. His offices are located in Room 1026, L. C. Smith Building, in the City of Seattle. He had in his office "valuable memoranda, papers, files, letters, receipts, bills and other papers of importance, some of which belonged to him personally, some of which belonged to his clients and had been entrusted to his care as an attorney, and others of which were memoranda and papers having

to do with his professional matters, and all of which were of more or less confidential nature and of great value to him personally and in the practice of his profession, and many of which were necessary for him in the preparation and conduct of cases pending in court, or about to be commenced therein." (Transcript p. 3.) Prohibition agents, brazenly and boldly representing to a United States Commissioner that relator and others were unlawfully dealing in intoxicating liquor at relator's office, obtained a search warrant to search the premises. They found no liquor. But they rummaged the office, and carried away with them an armful of papers of various kinds, to be used not only as evidence in themselves, but from which leads to other evidence would be obtained. The proceeding was unlawful. No right exists to search for evidence alone. (*Gouled vs. U. S.*, 255 U. S. 298, 65 L. Ed. 647.) But the papers were gone, and, unless they could be retrieved *instanter,* irreparable injury would be done relator and his clients. What to do? Any remedy to be conceived of was no remedy at all, unless it carried with it at least the immediate impoundment of the papers, so that not only copies or memoranda thereof could not be made of them, but that prying eyes

should not even examine them. They could not be replevied. (Sec. 25, Title 2, N. P. A.). Nor would a summary proceeding lie; for no cause was pending in any court giving the court jurisdiction of the subject matter; and the parties in possession of the papers were not officers of the court, so as to be reached in summary manner. (*Weinstine vs. Attorney General,* 271 Fed. 673; *Lewis vs. McCarthy,* 274 Fed. 496; *In re. Allen,* 1 F. (2nd) 1020; *U. S. vs. Hie,* 219 Fed. 1019.) What, then, was open to relator?

Relator launched a proceeding in the nature of certiorari, to bring up for review the proceedings of the United States Commissioner who issued the search warrant. As ancillary to the certiorari proceedings, relator asked for supersedeas writs, to impound, during such time as the court had under consideration the review of the Commissioner's proceedings, the papers seized under the search warrant, and asked that the court by its process prevent, while so having before it for review the proceedings before the Commissioner, the use of the papers and the use of any information gained by a perusal of them. The theory upon which relator proceeded was, that the search warrant pro-

ceeding was a nullity, because the Commissioner exercised judicial, or at least quasi-judicial, powers, in a matter in which his powers were limited, and had exceeded his jurisdiction in this: (a) he had issued a search warrant, without a showing of probable cause having first been made to arouse his jurisdiction, and (b) he had issued a search warrant void in law, which he was without jurisdiction to do; and the Commissioner having, through void proceedings, caused a certain status to exist, relator believed that the reviewing court had power to issue such ancillary writs of supersedeas, or in the nature thereof, as would keep the status of the proceedings before the judicial officer below exactly where it was when the reviewing court took jurisdiction, so that whatever decree the reviewing court might finally make in the matter would be effective.

We will discuss these propositions in the order in which they seem to arise logically.

DID THE COMMISSIONER EXCEED HIS JURISDICTION?

Who and what is a United States Commissioner we shall discuss later, when we come to discuss the question of reviewing him. For the present, he is

a creature of the statutes, invested with various powers. What the statutes say he may do, he may do without question. But being a creature of limited powers, it goes without saying that he may do *no more* than the statute says he may. No citation of authority is necessary for a proposition so fundamental.

Among other things, he may issue search warrants; but only upon certain conditions precedent. For instance, when affidavits or depositions are presented to him of a certain character, conforming to the requirements of sections 10496¼c, 10496¼d, and 10496¼e of Comp. Stat. Supp. 1919, being sections 3, 4 and 5, of Title XI, of the Act of June 15, 1917, (Espionage Act, search and seizure chapter). But suppose no affidavits, or other showing, is made at all? Clearly, under such circumstances, he has no power to act; and if he does issue a search warrant under such circumstances he acts without jurisdiction; because it requires a showing of some character before his jurisdiction is invoked. Let us suppose, again, that affidavits *are* filed, and depositions *are* taken, but that these affidavits and depositions fall short of the requirements imposed by the sections of the statute just cited. It is none the less

true that the Commissioner exceeds his jurisdiction if he issue a search warrant under such circumstances, because it is only upon the filing of affidavits or the making of depositions which conform to the requirements of the statute, that incite his jurisdiction at all. The books are full of instances where "motions to suppress evidence" have been presented, based upon an alleged insufficiency of the showing of "probable cause." In many instances these challenges have been upheld, and the motions granted. What is the principle underlying the granting of such motions? Nothing else than that the Commissioner was without jurisdiction to issue the search warrant in the given instance.

The Affidavit.

Now, let us look at the showing made in the case at bar. The "application" for the search warrant was made by one Earl Corwin, who describes himself as a "Federal Prohibition Agent," and is found at pages 8 and 9 of the record. Beyond saying that Jerry Finch (and six others, naming them) on the 17th day of November, 1924, was, and is, possessing and selling intoxicating liquor at 1026 L. C. Smith Building in Seattle, and that these

premises were not a dwelling, no statement of any character is contained in this application, though affiant "submits the attached affidavit and incorporates the same herein." This "application" is disposed of by the decision of this court in *U. S. vs. Lochnane,* decided Nov. 10, 1924, Case No. 4314, which at the time of writing we do not find reported in Federal advance sheets.

The "supporting affidavit" referred to in the application is found at page 10 of the record. It, too, is signed by same Earl Corwin—he "supports" himself. We will take it up piecemeal.

> "That on the 12th day of July, 1924, in the City of Seattle, affiant heard Jerry Finch state that he had intoxicating liquor in said premises at 1026 L. C. Smith Building."

Will an allegation that one heard a lawyer say, in July, that he had liquor in his office, be deemed "reasonable cause" to believe he had it there in November following? Indeed, that he ever had it?

> "and has heard said Finch make the statement on one or more times each month in August and September, 1924."

This statement, if made, could no more than excite a suspicion, and a search warrant can not issue on suspicion.

> "and has heard said Finch order intoxicating liquor very recently to be sent to said premises."

There is no showing that it was delivered, or that affiant had any reason to believe that it had been.

> "and has heard said Finch and Olmstead, Fletcher arrange at said premises for the traffic of intoxicating liquor and said parties state that the books and documents relating to the said intoxicating liquor were in said premises, and that some of said conversations were held within less than thirty days last past, and that affiant has heard some of the above parties make arrangements with reputed bootleggers to meet and transact business in said above premises relating to the sale, transportation and possession of intoxicating liquor."

Never having had a chance to deny these allegations, they must be taken here as true, galling as they are to the relator. But it is respectfully urged that, if true, they do not support an application for a search warrant *for liquor.* If offered in evidence at some trial, they might be competent to prove a conspiracy, but they are not statements of facts tending to show *possession of liquor* on the premises at which the search warrant was aimed, and are totally irrelevant to search warrant proceedings.

Taken as a whole, the application and affidavit

are eloquent in that what they do not say. Having had an opportunity to "hear" so much, it is amazing that the affiant, either in his application, or in the affidavit whereby he "supports" himself, could not, or did not, present some evidence from his sense of sight. The care with which the affiant calls attention to "all furniture, safes, receptacles, cabinets, desks, and equipment" of the office, in his application, and the command in the search warrant set forth at page 12 of the record, that he "diligently investigate and search the same (relator's office) and into and concerning said crime, and search the person of said above named persons, and from him or her, or from said premises seize any and all of the property, documents, papers and materials so used in or about the commission of said crime", lends much force to the charge in relator's petition (bottom p. 3, and page 4), "that the entire proceedings * * * were brought and are being prosecuted * * * for no other purpose or intent than to bring about an unlawful and wholly unwarranted search of the office of your relator, to obtain papers, memoranda, letters, files and things which might be used by those making such search in the preparation of cases now pending or about to be commenced, and

was wholly without any lawful or just purpose or intent, was false, oppressive, concocted in deceit, a subterfuge to gain unlawful advantage and a clear abuse of the process under which said action was taken."

We believe the affidavit to have been faulty to the extent that no showing of probable cause was made; hence the jurisdiction of the Commissioner was not invoked.

The Search Warrant.

Next let us consider the search warrant. (Record, p. 11). We have three objections to it. (1) It was directed generally, not to a person by name, but to three different classes of persons; (2) It was directed to, *inter alia,* Federal Prohibition Agents; and (3) It directed an investigation and search for evidence.

(1) *The warrant was directed generally, not to a person by name, but to three different classes of persons.* It read:

> "To the Marshal of the United States for the Western District of Washington and his deputies, or either of them, and to *any* Federal Prohibition Officer or Agent, or the Federal

> Prohibition Director of the State of Washington, or any Federal Prohibition Agent of said State, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents, or inspectors."

Note, please, it ran not alone to the Marshal of the District, and his deputies; but to *any* Federal Prohibition Officer or Agent. That means to any person of such character in the entire United States, for the local agents were covered in the direction "to the Federal Prohibition Director of the State of Washington, or (and) any Federal Prohibition Agent of said State." Also, the direction to the Commissioner of Internal Revenue, included his entire corps of assistants throughout the United States.

This is wrong, though we are unable at this moment of writing to lay hands upon any authority in the books. Our conviction, however, is borne of the evils experienced in the present instance. Relator does not know, up to this time, to whom the warrant was actually delivered, nor does he know who has possession of his papers, actually or constructively. The warrant itself has never been returned, nor the property seized turned in to the Commissioner, or into any court. Inquiry made of the perpetrators at the time the outrage was com-

mitted elicited the information that they went under the names of "Earl Corwin," "J. W. Simmons," "Walter Justi" and "W. J. Griffith," but whether they were officers and of what class, or what not, there is no record in this district to show. They may even have been outsiders called in to assist, under authority of the statute. (Comp. St. 1919, Supp. 10496¼g), and in no wise responsible for the acts done. Had the warrant run "to John Jones, United States Marshal, and his deputies," or to some other named officer, relator would know that John Jones, or other named officer, was primarily responsible for any act done under color of the warrant, and if any redress was sought he would know against whom to seek his remedy. Turning to a decision of Judge Neterer, rendered Jan. 8, 1925, not yet reported, this court may learn that relator acting in behalf of one of his clients, one Roy Olmstead, sought to have so much of the papers taken from relator's office as concerned Olmstead kept from the grand jury room. The action was aimed at the United States Attorney, to whom it was alleged, *upon information and belief,* the papers had been delivered for the purpose of placing them before such grand jury. The Honorable United States

Attorney stated in open court, upon the hearing, that he did not have the papers, and, quite naturally, Olmstead was denied the relief sought. This record does not show that the papers got before the grand jury, but this court can readily see our point. They may travel around in circles, from one hand to another, into the grand jury room and out, always under cover; and all due to the fact that the search warrant fixed no single definite responsibility upon any one. The Commissioner made possible the execution of the warrant, but impossible the responsibility therefor. A warrant of that character must of necessity be void.

Strength is given this view from a reading of Section 7, Title XI, of the Act of June 15, 1917 (10496¼g):

> "A search warrant may in all cases be served by any of the officers mentioned in its direction, *but by no other person*, except in aid of the officer on his requiring it, *he being present* and acting in its execution."

Note, in connection with the naming of the officer to serve the warrant:

U. S. vs. Syrek, 290 Fed. 820;

U. S. vs. Innelli, 286 Fed. 731;

U. S. vs. Musgrave, 293 Fed. 203;
Contra, Gandreau vs. U. S., 300 Fed. 21.

(2) The *search warrant was directed to Federal Prohibition Agents, inter alia.* Besides being directed to the United States Marshal and his deputies, and to the United States Commissioner of Internal Revenue, and his entire corps of assistants, deputies, agents and inspectors, it also ran,

> "to any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or any Federal Prohibition Agent of said State."

We contend the law does not permit a United States Commissioner to issue a search warrant directed to prohibition agents. If correct in this view, the Commissioner exceeded his authority in so doing, and his act was void for want of jurisdiction.

Section 25, Title II, of The National Prohibition Act, provides, *inter alia,*

> "* * * A search warrant may issue *as provided in* Title XI, of public law number 24, of the Sixty-fifth Congress approved June 15, 1917, * * *"

Section 2 of the same act and title says, in part:

> "* * * Section 1014 of the Revised Statutes of the United States is hereby made applicable

to the enforcement of this act. Officers mentioned in said Section 1014 are authorized to issue search warrants *under the limitations provided in* Title XI, of the act approved June 15, 1917."

Thus we have two provisions in the act itself providing for a search warrant; one saying that it may be issued "as provided in," the other, "under the limitations provided in," Title XI, etc. Now, Title XI, etc., is the "search and seizure" section of the Espionage Act (Comp. St. Ann. Supp. 1919, Sec. 10496¼a, *et seq.*), and there we find a provision as follows:

> "If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a *civil officer* of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, * * *"

Comp. St., 10496¼f, 1919 Supp.

These provisions present the question squarely, whether search warrants may be lawfully issued to and served by "federal prohibition agents;" that is, is a federal prohibition agent a "civil officer" of the United States, within the meaning of these sec-

tions? The relator believes he is not; and if he is not, that the national prohibition act can not be enlarged by interpretation to include him within that class.

What is a Federal Prohibition Agent, anyway?

There is no such official known to the law as a "Federal Prohibition Agent,' 'the term being used simply as a convenient designation for departmental purposes.

> *Heaton vs. U. S.*, 280 Fed. 697 (C. C. A. 2nd Cir.).

Their origin springs from Article II, Section 2, of the Constitution, which reads in part as follows:

> "But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments,"

and the National Prohibition Act, Sec. 38, which reads, in part:

> "Sec. 38. The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectfully authorized to appoint and employ such assistants, experts, clerks, and other employees, in the District of Columbia and elsewhere, * * * as they may deem necessary for the enforcement of the provisions of the act * * * ."

No doubt the court will take judicial notice of the fact that the Attorney General has never yet taken advantage of his power to appoint prohibition agents; that the appointment of the large corps of assistants necessary for the enforcemnt of the prohibition act has, so far, been left to the internal revenue department, rather than to the department of justice.

The form of appointment of these prohibition agents is usually as follows:

"No. United States Treasury Department
Internal Revenue Service, 1924.

This certifies that John Doe, of.................., is hereby employed as a Federal Prohibition Officer to act under the authority of and to enforce the National Prohibition Act and acts supplemental thereto and all internal revenue laws relating to the manufacture, sale, transportation, control and taxation of intoxicating liquors, and he is hereby authorized to execute and perform all the duties delegated to such officers by law.

D. H. Blair, Com'r Internal Revenue.

(Countersigned) R. A. Haynes,

Federal Prohibition Com'r."

Keehn *vs. U. S.*, 300 Fed. 493, at 506.

The duties of these prohibition agents are defined by Section 2, of Title 2, of the Prohibition Act, as follows:

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors, *shall investigate and report* violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the attorney general, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents and inspectors, may swear out warrants before the United States Commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the United States Attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury * * *."

These sections, so far as we can discover, cover the matter of their appointment and their duties. Apparently, then, they are humble employees, engaged for the purpose of ferreting out violations of the prohibition act.

Then why and how do we find these agents all over the United States in possession of and freely executing these drastic instruments of the law? Search of the books reveals their right to do so has been challenged no less than seven times.

U. S. vs. Keller, 288 Fed. 204;
U. S. vs. Syrek, 290 Fed. 820;

U. S. vs. O' Conner, 294 Fed. 584;
U. S. vs. Innelli, 286 Fed. 731;
U. S. vs. Musgrave, 293 Fed. 203;
U. S. vs. Loeffelman, 297 Fed. 472;
U. S. vs. Montalbano, 298 Fed. 667;
Keehn vs. U. S., 300 Fed. 493 (C. C. A.).

And we are disappointed to find that six out of the seven cases sustains the agents in this claim of power. The exception is *U. S. vs. Musgrave,* above, though a vigorous dissenting opinion by Judge Anderson, in *Keehn vs. U. S.,* above, adds great comfort to one whose reason casts his lot with the minority. Each of the six cases grant that these agents are not officers in the constitutional sense of that term, and are not *eo nomene* entitled to execute such warrants. But they grant them the power, by interpretation. They profess to see in various sections of the prohibition statute, and in various combinations of such sections, justification for *extending* and *enlarging* section 6 of the Espionage Act above quoted (Comp. St. 1919 Supp. 10496¼f), to include such agents. They do this in spite of the provisions of the act itself, that a search warrant may issue only "as provided in," and "subject to the limitations provided in" said Section 6, and in violence to the universal rule that search warrant provisions shall be strictly construed.

The able opinion of Judge Woodruff, in *U. S. vs. Musgrave,* above, and still more vigorous dissent of Judge Anderson, in *Keehn vs. U. S.,* above, leave little to be said in rebuttal of the majority, and any humble effort of ours would add no weight to what they say, so we leave the argument to them, with this added suggestion: Several of the courts refer to Section 28 of the National Prohibition Act to buttress their opinions. Should this court deem that section at all controlling, we refer this court to *Smith vs. Gilliam,* 282 Fed. 628, for an elaborate exposition of the import of said section 28.

Note. In a final search for the last work on this question, made since this point was developed for the printer, the opinion of this court in *Raine vs. U. S.,* 299 Fed. 407, has fallen under the eye of the writer for the first time. That case is squarely in point, and decides the question against our contention. Such being the law, we bow to it, but the writer can not refrain from expressing a regret that before so much authority had accumulated upon the point the minds of the various courts had not been squarely focused upon the many evils to follow such holding, of which the case at bar is so illuminating.

These agents are not under oath. Neither do they furnish any bond. There is no provision in the law for oath or bond. They, most of them, are fly-by-nighters. They are here today, there tomorrow—hired today, fired tomorrow. They are, for the most part, "under cover" men. They stay in one locality until they become known. Then their usefulness ended, they are shunted to a different district, to begin over again. Seldom do they go by their right names, nor do they maintain the same assumed name long. They are irresponsible financially, and no one in a given district is responsible for their acts, for they are employed from Washington. For any evil they do there is no redress. They step into some commissioner's office and obtain a search warrant. Nothing can stop them, provided they swear to "reasonable cause." Then they sally forth. Once the door of the Commissioner's office is closed behind them, they become a law unto themselves. No power on earth can control them. They run amuck with their search warrant, taking what their own will prompts them to take. But they don't show again. They neither return the search warrant, nor bring the property before any court. The Commissioner is powerless in the premises, for the law has cloathed

him with no power. And now we have the district courts confessing equal impotency. (Besides decision in the case at bar, see *U. S. vs. Maresca,* 266 Fed. 713; *U. S. vs. Mathes,* 1 F. (2nd) 935; *U. S. vs. Casino,* 286 Fed. 976; and also *In re Chin K. Shue,* 199 Fed. 282.)

It may be, indeed, that Congress contemplated giving such power to such irresponsibles; but if it did, one may be pardoned for thinking it was poor policy.

(3) *The warrant directed an investigation and search for evidence.*

This was clearly wrong. No right exists to search for evidence alone.

> *Goulet vs. U. S.,* 255 U. S. 298, 65 L. Ed. 647;
> *Giles vs. U. S.* (C. C. A.), 284 Fed. 208;
> *Veeder vs. U. S.* (C. C. A.), 252 Fed. 414.
> *Lipschutz vs. Davis,* 288 Fed. 974.

For the first and second reasons discussed, at least, the warrant was void, and the Commissioner exceeded his jurisdiction in issuing it.

WILL CERTIORARI LIE?

Granted that the Commissioner exceeded his jurisdiction, will certiorari lies to review him? And

will it afford a suitable remedy? Before discussing the question it is appropriate to consider what United States Commissioners are, and their relation to the Federal Judicial System. It is remarkable how little the subject has been touched upon in the books and nowhere has it received exhaustive treatment.

WHAT IS A UNITED STATES COMMISSIONER?

As they now exist, United States Commissioners are the successors of the Circuit Court Commissioners, in vogue when we had a circuit court.

> "It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States Commissioners, at such places in the district as may be designated by the district court, which United States Commissioners shall have the same powers and perform the same duties as are now imposed upon Commissioners of the circuit court. * * *"

2 U. S. Comp. St. 1333.

But is the Commissioner a court? Does he "sit?" If so, in what court? Is he independent? Is he reviewable? And if so, how? We will quote from the books wherein we have found mention made of his character and functions.

The first word upon the subject, apparently,

was pronounced in 1866 by Mr. Justice Field, Circuit Justice for California (Fed. Case 16,235). After a hearing had before a United States Commissioner, the District Attorney proposed to dismiss certain criminal proceedings contrary to opinion of the Commissioner, and the latter appealed to the court for its opinion on the power of the District Attorney so to do. Justice Field said, *inter alia:*

> "He (the Commissioner) is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. * * * He has no divided responsibility with any other officer of the government; nor is he subject to any other's control. * * * We are clear that he must act upon his own judgment of the law and evidence, and not upon that of any other person."

U. S. vs. Schumann, Fed. Cas. 16,235.

Not until 1894 did the Supreme Court of the United States speak upon the subject. In *United States vs. Allred,* decided in that year (155 U. S. 591, 39 L. Ed. 273), the Supreme Court set forth in detail the powers of Circuit Court Commissioners as those powers existed when that decision was rendered. As the list of powers is long it will not be copied here, but the court is respectfully cited to the case for the same. Having in mind the powers

of Commissioners as recited by the court, the court then defined the status of such Commissioners in these words:

> "While the duties are thus prescribed by law, and while they are, to a certain extent, independent in their statutory and judicial action, there is no law providing how their duties shall be performed; and so far as relates to their administrative action, we think they were intended to be subject to the orders and directions of the court appointing them. As was said by this court in *Griffin vs. Thompson,* 43 U. S. 2 How. 244, 257, 11 L. Ed. 253, 258, 'there is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgment and process. Without this power courts would be wholly impotent and useless.' While no expressed power is given over these officers by statute, their relations to the court are such that some power of this kind must be implied. Though not strictly officers of the court, they have always been considered in the same light as masters in chancery and registrars in bankruptcy, and subject to its supervision and control."
>
> *U. S. vs. Allred,* 155 U. S. 591, 39 L. Ed. 273.

A little later in the same year the same court spoke of them in this manner:

> "That a Commissioner is not a judge of a court of the United States within the constitutional sense is apparent and conceded. He is simply an officer of the Circuit Court appointed

and removable by that court. * * * A preliminary examination before him is not a proceeding in the court which appointed him, or of any court of the United States."

Todd vs. U. S., 158 U. S. 278, 39 L. Ed. 982.

The last expression of that court upon the subject, so far as we are able to find, was written in 1902, wherein it was said:

"The Commissioner is in fact an adjunct of the court, possessing independent, though subordinate judicial powers of his own."

Grin vs. Shine, 187 U. S. 181, 47 L. Ed. 130.

Expressions from lower courts now follow:

"They (Commissioners) are not strictly officers of the Circuit Court, but exercise somewhat independent powers. They may be controlled by the court by general rules and by the mandatory writs by which courts of superior jurisdiction can control the actions of courts and officers of inferior jurisdiction and powers."
U. S. vs. Harden, 10 Fed. 802, at 803.

"They are not conservators of the peace * * *. They are not prosecuting officers, but exercise important judicial functions in passing upon questions involving the rights of the government and the liberty of the citizen."

Same, at page 806:

"Commissioners have no power to punish

for contempt. But the contumacious conduct of parties, witnesses and others guilty of such conduct should be referred to the Circuit (now District) Court."

Ex parte Perkins, 29 Fed. 900;
In re. Perkins, 100 Fed. 950;
U. S. vs. Beavers, 125 Fed. 778.

"Much of the fallacy in the reasoning on this subject is founded on the assumption that a Commissioner holds a court. The assumption is unsound and misleading. The Commissioner holds no court. He acts as an arresting, examining and committing magistrate."

Ex parte Perkins, above, (29 Fed.), at p. 909;
In re. Perkins, above, (100 Fed.), at p. 954.

Commissioners may issue subpoenaes.

U. S. vs. Beavers, 125 Fed. 778.

"They were originally authorized to be appointed by the United States Circuit Courts for the purpose of taking oaths and acknowledgments. Their powers were subsequently increased by various statutes and rules of court. By Section 1014 of the revised statutes (Comp. St. 1674) they were authorized to act as examining and committing magistrates in criminal cases in any state 'agreeably to the usual mode of process against offenders in such states'."

U. S. vs. Beavers, 125 Fed. 778, at p. 779.

"The power of a Commissioner when sit-

ting as a criminal magistrate, to issue subpoenaes, has sometimes been thought to be a power inherent in his office, independent of statute; *for though he is not strictly a court of the United States* (*Todd vs. U. S.,* 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982), *he discharges judicial functions* of grave importance, and in so doing has no *divided responsibility* with any other officer of the government, and is not subject to any other's control."

Same, at 780, and cases cited.

> "United States Commissioners are neither judges nor courts, nor do they hold courts, although sometimes they act, so far as *jurisdiction and power* is conferred upon them, in a *quasi judicial* capacity."

U. S. vs. Tom Wah, 160 Fed. 207, at 208.

Citations upon the subject would not be complete if special mention were not made of two New York cases, *U. S. vs. Maresca,* 266 Fed. 713, decided by Judge Hough, sitting in the Southern District of New York, and *U. S. vs. Casino,* 286 Fed. 976, decided by the same court, but with Judge Hand presiding. It is impossible to do justice to either by quotation, and the court is respectfully cited to the original decisions. We shall have occasion to refer to them again, when we come to treat of certiorari as a remedy.

See, also,

In re. Chin K. Shue, 199 Fed. 282.

All of the cases from which we have quoted, except the two New York cases just cited, were decided before the National Prohibition Act took effect. We think it desirable to consider that act as having a possible bearing upon the subject, for we believe it fair to say that the Prohibition Act has enlarged the functions of the Commissioner, so that now, if not before, he acts in a judicial capacity, or as a new tribunal having limited jurisdiction. To show the point, we quote some of the sections taken from the Espionage Act, the search and seizure sections adopted by the Prohibition Act:

> "If the * * * Commissioner * * * is satisfied of the existence of the grounds of the application or that there is a probable cause to believe their existence, he must issue a search warrant * * * commanding him forthwith to search the person or persons named, for the property specified, and bring it before the Commissioner."

Sec. 6.

> "If the grounds on which the warrant was issued be controverted, the * * * Commissioner must proceed to take testimony in relation thereto, * * *."

Sec. 15.

> "If it appears that the property or paper taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the * * * Commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant issued, then the * * * Commissioner shall order the same retained in the custody of the person seizing it, or to be otherwise disposed of according to law."
> Sec. 16.

Now, can it be said that an officer upon whom has been conferred power to judicially determine whether or not a search warrant should issue, and before whom, upon the search warrant being returned and the allegations of the application on which it issued being controverted, a trial of issues of law and fact may proceed, and a judgment or final order be made thereupon, restoring or holding property, does not exercise more than quasi judicial functions? It seems to relator that by conferring these powers upon the commissioner, Congress has raised the commissioner in status to a special tribunal.

Again,

> "The * * * commissioner must annex the affidavits, search warrant, return, inventory, and evidence, and if he has not power to inquire into the offense in respect to which the warrant issued he must at once file the same, together with a copy of the record of his proceedings, with the Clerk of the Court having power to so inquire."

Sec. 17.

An officer exercising judicial functions, who is required to certify his proceedings to another court, there to be used in the prosecution of the offense to which such proceedings relate, is in the very nature of things a court; and a court inferior to the one to whom he certifies his proceedings.

We have garnered the cases treating upon the question however slightly, in order to arrive at a conclusion for ourselves. But no case having gone deeply into the subject, and such as have touched upon it at all being so out of harmony, our conclusion is of little moment to a court charged with responsibility to settle the question. Judges Hough and Hand, sitting in the same court, seem to have gone fartherest toward final conclusion, and to have given the subject deepest thought. But while both agreed that proceedings before a commissioner were proceedings in the district court, beyond that their

decisions are completely out of harmony.

WILL CERTIORARI LIE?

In *U. S. vs. Maresca,* 266 Fed. 713, hereinbefore referred to, Judge Hough concluded that a United States Commissioner, acting in search warrant proceedings, is "a justice of the peace of the United States" (p. 720); that in so acting, "he does it in and as part of the proceedings of the district court" (p. 723); that the commissioner, under such circumstances, is exercising a power equal to the power of the district court, because the search warrant statute entrusts the issuance of the warrant to the commissioner and to the district court in common; therefore the commissioner can not be reviewed by the district court, any more than one judge can review the proceedings of any other judge sitting in the same court (p. 724); therefore, certiorari does not lie (p. 722), and the only remedy is a writ of error from the commissioner to the Circuit Court of Appeals (p. 724).

But in *U. S. vs. Casino,* 286 Fed. 976, Judge Hand, sitting in the same court three years later, had the same question before him, and he took occasion to comment upon the *Maresca* case. He assumed

without question that the commissioner's proceedings were in the district court, and that the latter might take judicial notice of them (p. 978). He followed this by holding that such proceedings were "a 'preliminary stage' to an inquiry which the court must eventually determine" (p. 981). That certiorari, whether it lie or not, was unnecessary; that a "motion," on notice to the district attorney, would present the question for consideration; and he disposed of the matter instanter (p. 981). In conclusion, however, he indulged the hope that the matter might be carried to the Circuit Court of Appeals, that the question of proper practice might be authoritatively settled. Apparently this hope was not realized, and the practice remains unsettled.

If Judge Hand was right, that commissioner's proceedings are proceedings in the district court, and may be corrected or reviewed upon motion, with notice to the United States attorney, then relator has been making something hard out of something very easy. Even the ancillary relief sought lay at hand, in plain sight and ample, for in the *Casino* case Judge Hand ruled, "An order may pass, quashing the warrant and directing the liquor to be returned to the petitioner. Whoever holds the liquors at the

present time is subject to the order of this court under Section 25. The order will primarily go against the prohibition agent making the seizure; if he has delivered the goods to some other official, the order will direct the latter to make the return." (p. 981). That is all relator desired; an order to pass quashing the warrant and directing the papers to be returned to petitioner; that whoever held them, held them subject to the order of the court; that this order go primarily against the prohibition agents making the seizure; and if they had delivered them to some one else then the order to direct the latter to make the return.

If such is the law, then the lower court was in error in denying relator the relief sought. True, we styled our proceedings "certiorari," but it makes no difference by what term the proceedings are called. The facts were plainly stated, entitling relator to relief, and the prayer had the usual alternative, "for such other and further relief as may seem meet and proper in the premises according to equity."

But if such is not the law, and some plenary proceeding is necessary, does certiorari lie, Judge

Hough to the contrary notwithstanding?

The statutes of the United States at one time provided in specific terms for the writ of certiorari. (Vol. 2, Rev. St., p. 1294, Sec. 542, et seq.). But these sections were repealed by the Judicial Code of 1911. (Jud. Code, Sec. 297, Comp. St. 1274). In lieu thereof Congress enacted as follows:

> "The supreme and the district courts shall have power to issue writs of *scire facias*. The Supreme Court, the circuit court of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

R. S. 716, Jud. Code, 262; Comp. Stat. 1239.

The general right of district courts to issue the write of certiorari is recognized *In re Chetwood,* 165 U. S., at p. 461, 41 L. Ed. 782. (See *U. S. vs. Maresca,* 266 Fed. 713, at 722).

> "The decided weight of authority supports the proposition that the common-law writ of certiorari may be awarded to all inferior tribunals, where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed or other mode provided for reviewing their proceedings."

5 R. C. L., "Certiorari," Sec. 4, p. 251.

"As a general rule the common law writ of certiorari may be awarded to all inferior tribunals and jurisdictions, where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed or other mode provided for reviewing their proceedings. Therefore an appellate court may grant a writ of certiorari to bring up for review a search warrant and the proceedings in which it has been issued, and may quash the warrant if it is shown to have been issued improperly. And it has been held that certiorari lies to review the action of a justice of the peace without jurisdiction in issuing a search warrant not authorized by statute, even if there is a remedy by appeal."

24 R. C. L., "Search and Seizure," Sec. 14, p. 711.

Function of Writ of Certiorari.

The office of the writ is to bring to a superior court for review the record and proceeding of an inferior court, *officer,* or a *tribunal* exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected.

6 *Cyc.* 752, and cases cited.

When a new or summary jurisdiction is created,

the proceeding so authorized, *whether in court or not,* if of a judicial or quasi judicial character, and not subject to review by writ of error or appeal, may be removed to and reviewed by a superior court by virtue of this writ (certiorari).

5 R. C. L., p. 253.

Parks vs. Boston, 8 Pic. (Mass.), 218, 19 Am. Dec. 322, 40 A. S. R. 30.

It is not a proceeding *against* the tribunal, or any individual composing it: it acts upon the cause or proceeding in the lower court, and removes it to the superior court for reinvestigation.

11 *Cor. Jur.,* p. 89, Sec. 2B.

So it has been held that certiorari will lie to all tribunals which are called extraordinary and special, in contradistinction to the ordinary and common courts established for the trial of criminal offenses and the determination of private rights.

11 *Cor. Jur.,* p. 98, Sec. 24F.

The Supreme Court of the United States in a case not in point upon the facts, but which involves a discussion of certiorari and its office, said:

"Certiorari always has been recognized in the district as an appeal process for reviewing the proceedings in a subordinate tribunal when it has proceeded, or is proceeding to judgment without lawful jurisdiction (citing several cases). And the power to employ the writ inheres in the Supreme Court of the district as possessing a general common law jurisdiction and supervisory control over inferior tribunals, analagous to that of the King's bench. * * * The writ lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed, if it be made plain to appear that such inferior court or special tribunal had no jurisdiction of such matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property without due process of law (citing several cases).

Hartranft vs. Mallowny, 247 U. S. 295, 62 L. Ed. 1123, at 1126.

Under their supervisory powers courts of general jurisdiction exercise, by writ of certiorari, a control over all inferior jurisdictions however constituted, which are vested with power to decide on personal or property rights, and whatever their course of proceedings:

6 *Cyc.* 770, "A," and cases cited.

The court is the only necessary party respondent in a proceeding to review its order.

> 6 *Cyc. L. & Pro.*, p. 776 (B).
> *Baker vs. Shasta Co. Sup. Ct.*, 71 Cal. 583.

Review of Search Warrant Proceedings by Certiorari.

In *ex parte Oklahoma*, 220 U. S. 191, 55 L. Ed. 431, the Supreme Court of the United States held that a writ of certiorari to bring up for review a search warrant and the proceeding in which it issued was a proper remedy, and not prohibition, and that on certiorari the search warrant proceeding, if shown to have been issued improperly, might be quashed.

And it has been held that certiorari lies to review the action of a justice of the peace in issuing a search warrant not authorized by statute, even if there is a remedy by appeal.

> *White vs. Wager*, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

In the Canadian courts exercising common law jurisdiction the right to review search warrant proceedings by certiorari was upheld in the case of *Rex vs. Kehr* (Ont.), 6 Ann. Cas. 612.

The only cases to the contrary which relator has been able to find, after a search of the books bearing on the question, are the two cases,

> *Farrow vs. Springer,* 57 N. J. L. 353, 31 Atl. Rep. 215;
>
> *Lynch vs. Crosley,* 134 Mass. 313.

These two cases are *sui generis:* In the Massachusetts case the court held there was an adequate remedy under the statutes of that state. In the New Jersey case, it should be held in mind that the laws of the state embody prior equity practice under which a court may make an equitable ruling for the instant case before it, and the court held that the remedy by a suit for damages would give substantial relief to the petitioner there.

ANCILLARY MATTERS.

We had asked for the impoundment of the papers, and an order restraining their use or the use of any information gained from a perusal of them. The lower court was much perturbed over these requests. He feared, to use his own words, that such an order would "cause the court to appear ridiculous," being of the opinion that he could not

control parties not officers of the court nor parties to the proceedings.

Relator believes that if the lower court has power to review at all, and should enter an order taking jurisdiction for that purpose, then if he find the commissioner's proceedings are a nullity, he has full power to enter such orders in the premises as are necessary to grant effective relief. In other words, if he takes over the proceedings at all, the situation becomes the same as though he had started the search warrant proceedings himself. Had he started them, no doubt he would have power to finish them.

We do not entertain the same misgivings he does about controlling prohibition agents, because they are not officers of his court. If he has jurisdiction of the proceedings at all, then he can control them, for in that event they *are* "officers" of his court. They are the ones armed with the search warrant. Whether they be "officers" of the court, or "adjuncts," "arms," "agents," servants," or by what name they be called, makes no difference. They were sent forth with the writ. Then they can be recalled, or otherwise controlled, not because they are officers in fact, but because they were the agency

used to execute the warrant of the court.

Impoundment of papers is recognized practice.

U. S. vs. Mills, 185 Fed. 318;
U. S. vs. McHie, 196 Fed. 586;
U. S. vs. Mounday, 208 Fed. 186;
Silverthorne Lumber Co. vs. U. S., 251 U. S. 385, 64 L. Ed. 319.

IN CONCLUSION.

The prohibition agents have now had possession of relator's papers for so long a period that to impound them now would not be the remedy that it would have been if done before they had had exhaustive use of them. Nevertheless, relator is entitled to have them back, and such relief as the court can afford against the use of them and any information obtained from them, and we trust this court will see its way clear to instruct the lower court to grant such relief as relator is clearly entitled to.

Respectfully submitted,

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4446

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH, Appellant

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington, Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

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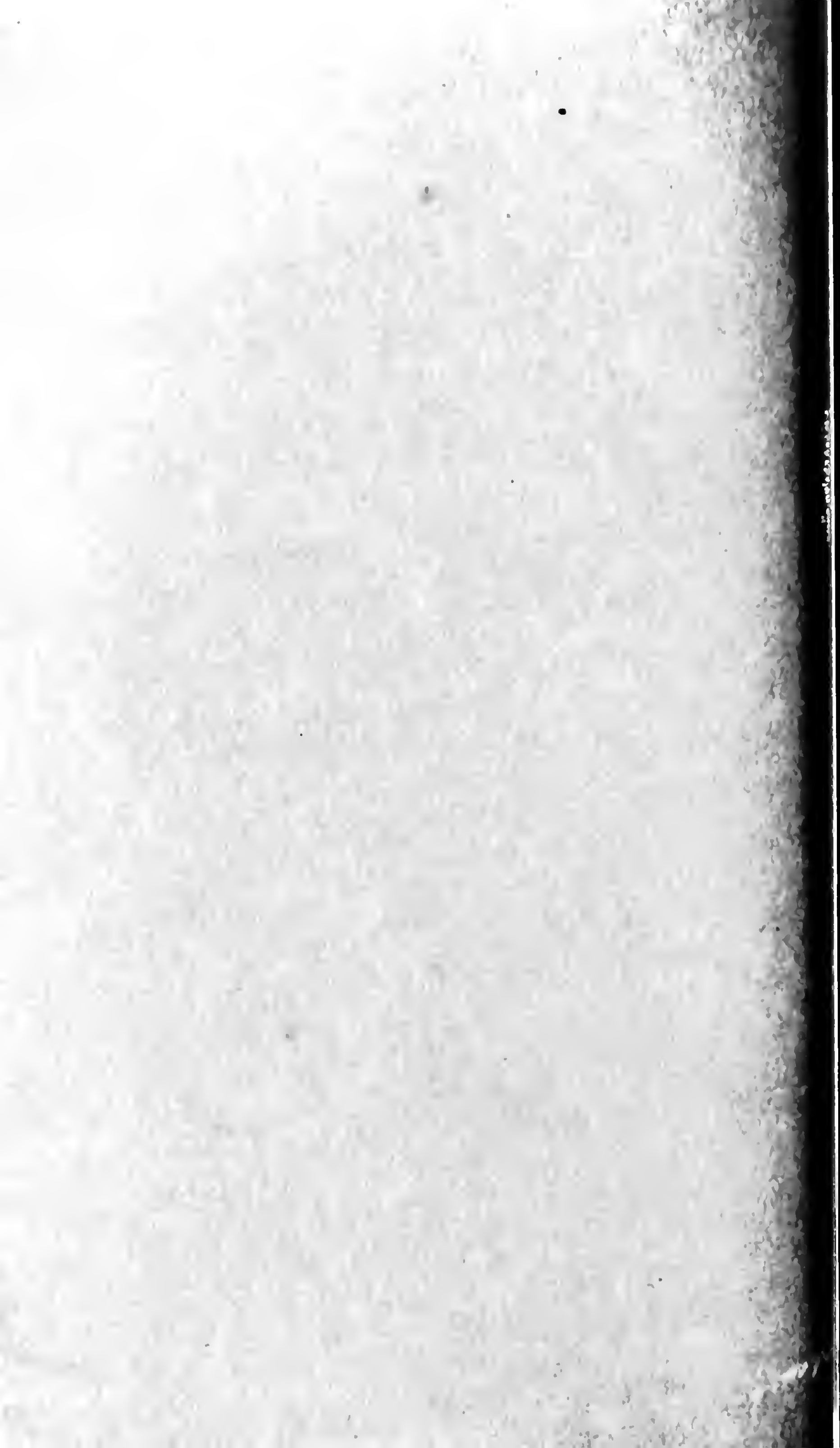

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Brief of Appellee

STATEMENT OF THE CASE

On November 25, 1924, the appellant filed in the District Court an amended petition for writ of certiorari, setting out the facts that a search war-

rant had been issued by the United States Commissioner, that the search warrant had been served and executed by prohibition agents of the United States, that certain documents had been taken from the possession of appellant, and prayed as follows:

"Wherefore your relator prays, that a writ issue to the end and purpose that a review of all proceedings had before said respondent in the premises be made, and that a time and place be fixed in said writ for the return of all such proceedings to this court and for a hearing thereon, and that on such hearing such relief be granted as to this court may seem meet and proper in the premises. And your relator further prays that said writ direct and order that pending a hearing on such return all proceedings before the respondent upon such matter be stayed, and further direct that all papers, books, files, letters, receipts, memoranda and other things taken and seized under such search warrant be forthwith delivered up to the Marshal or Clerk of this Court or such other custodian as may be named in said writ so to be impounded until final order be made herein, and further order and restrain that until such final determination be made in the premises, all officers, agents and persons whomsoever into whose hands the said papers, files, memoranda, and other things so taken and seized under such warrant have come desist and refrain from disclosing or in anywise making use of any knowledge, information or thing learned from any examination thereof by them made."

Which petition and prayer was denied by the District Court, upon the ground that it had no jurisdiction.

ARGUMENT

The District Court has no inherent power to review the issuance of a search warrant by United States Commissioner.

The District Court is a creature of the Constitution and laws of Congress and has no power such as is expressly granted, or necessarily implied from the language of the statute creating. The authority to grant a search warrant is found in Section 10496¼-b of the Compiled Statutes of the United States, which is as follows:

"A search warrant authorized by this title may be issued by *a judge of the United States District Court* * * * or by a United States Commissioner * * *."

The District Court's power and the Commissioner's power to issue a search warrant emanate from a common source, wherein no more power is granted to one than the other to issue a search warrant, and only upon probable cause. In determining whether this court has jurisdiction to entertain this petition and grant a writ of certiorari to the commissioner,

the nature of a writ of certiorari must be fully understood.

"Certiorari: (is) a writ issued by a superior to an inferior court of record, or other tribunal or officer, exercising a *judicial function*, requiring the certification and return to the former of some proceeding then pending, or the record and proceeding in some cause already terminated, in cases where the procedure is not according to the course of common law."

Bouvier's Law Dictionary.

Consequently, it is plain to be seen that the District Court in granting a writ of certiorari, would be undertaking to review the actions of an officer who has as much power as the Judge of this court, in the same instance, and the reviewing of his actions would be merely duplicating the acts of the commissioner. This court under the statute aforesaid would not consider for a moment a similar action brought before one District Judge, to review the acts of another. Why? Because they have the same and equal powers to do the act complained of.

In *United States v. Maresca*, 266 Fed. 722, the court said:

"The general right of this court to issue that writ is recognized in Re Chetwood, 165 U. S. 461; but

if used, there is an implication that it goes to a tribunal, or at least an official, separate from, independent of, and in some way inferior and subordinate to, the issuing court, *unless it be used, as has often been th ease, as an adjunct to some other process, usually habeas corpus.*"

Further, the same court says:

"That a certiorari may issue to an 'inferior court' is undoubted, and the decision in White v. Wagar, 185 Ill. 195, goes upon this ground alone, for by the law of that state it is said, a justice of the peace is 'a court of limited powers.' But it does not follow that a certiorari must issue, and as against a magistrate exercising only the arresting and committing powers, it ought not to issue, and, unless imposed by statute, cannot issue under customary law, as is well and I think conclusively shown by Magie, J., in Farrow v. Springer, 57 N. J. Law 353, 31 Atl. 215. There is no statutory imposition of that remedy by Congress, and therefor in my opinion it does not exist in this matter."

Consequently, it would seem that the only Court having power to review the acts of a commissioner would be an action brought in the Circuit Court of Appeals. In a case well in point, *Farrow v. Springer*, 57 N. J. L. 353, the court said:

"Will the court by writ of certiorari certify a magistrate's proceedings? If it can do so it is conceived that the writ will lie to review any warrant

for assault and battery, or larceny, or other crime charged on oath; and the complaints and warrants, which, by our criminal procedure are to be laid before the grand jury will considered drawn into this court, for there is no perceptible difference between the violation of a man's liberty by his arrest on a criminal charge and the violation of his right of property by a search for goods, the possession of which has been obtained by crime. * * * My *search has not disclosed any trace of the use of the writ of certiorari to remove the warrants of a magistrate in criminal cases or the proceedings thereunder*, prior to the finding of an indictment; and the writ is then obviously used, not for the purpose of review, but to remove the record with the object of proceeding upon it in this court. * * * My conclusion is that a certiorari ought not to be allowed to bring up a warrant of a magistrate issued upon a complaint of a criminal natue. The determination to issue the warrant is not a final determination of the matter put in litigation by such a complaint. Nor can that matter be pursued in this court at that stage of the proceeding, but only before the grand jury of the proper county. If such a warrant has been issued by a magistrate in a matter neither really not colorably within his jurisdiction, the person aggrieved thereby may recover damages from him in a civil action. If the matter be colorably within his jurisdiction the person affected by his action must await the action of the grand jury upon the complaint which gives color to the jurisdiction. The result is that this writ should be dismissed, and no opinion will be expressed as to the sufficiency of the complaint or the correctness of the warrant."

In *Degge v. Hitchcock*, 229 U. S. 170, the Court said:

"The modern decisions cited to sustain the *power* of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors and administrative officers, but even to the Chief Executive of a State in proceedings where a quasi-judicial order has been made. *But none of these decisions are in point in a federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.*"

If the Commissioner were in any sense a court he would have to be appointed for life, and would have jurisdiction in all matters that the District Court is vested with.

Constitution, Article III, Sec. 1 and 2.

II. *The United States District Court has no authority in law nor inherent power to review the acts of a municipal officer of the Government unless expressly provided by statute.*

The function of a United States Commissioner in issuing a search warrant is a ministerial and not a judicial function.

Bates v. Payne, 194 U. S. 106;
Marquiz v. Frisbie, 101 U. S. 473;
Degge v. Hitchcock, 229 U. S. 162;

U. S. v. Maresca, 266 Fed. 723;

U. S. v. Berry, 4 Fed. 779;

The Mary, 233 Fed. 121;
U. S. v. Casino, 286 Fed. 978;

Todd v. U. S., 158 U. S. 278;

U. S. v. Maresca, 266 Fed. 723.

In *U. S. v. Maresca, supra*, the court said:

"These considerations also lead to a denial of certiorari, for I do not need to be 'made more certain' of what has been done. Are not all the written records entitled in the court in which I am now sitting? Remember that nothing but an act of Congress can make an inferior court of the United States, *that no act makes a commissioner's court*, and that by tradition an examining and committing magistrate, especially a justice of the peace, holds a court, I am compelled to the conclusion that, when a commissioner issues criminal process, including a search warrant, he does it in and as a part of the proceedings of the District Court."

"* * * But he does the act, not by virtue of any grant of power to the court as such, but by grant directly to him, and it is the same power which is given by the same statutes, and given personally to Justices of the Supreme Court and Circuit and District Judges, each of whom may sit as magistrates, with the same and no other powers."

In *U. S. v. Casino, supra*, Justice Hand, in passing upon a motion for the *return* of property, namely liquor, said:

"It is clear that the owner of property unlawfully seized has, without statute, no summary remedy for a return of his property. * * * In re Chin K. Shue (D. C.), 199 Fed. 282. He may have trespass, or, if there be no statute to the contrary, replevin; but just as in our law no public officer *has any official protection, so no individual has exceptional remedies for abose of power by such officers.* We know no 'administrative law' like that of the Civilians."

In *U. S. v. Berry, supra*, the court said, in speaking of commissioners:

"Indeed, they are not, and under the constitution they cannot be, clothed with judicial power to hear and finally determine any matter *whatsoever.* Their duties relate only to the detention of the accused until the charge against him may be formally presented to the court, and constitutionally tried. In that they are not bound to hear more than the evidence of the government, and they do not finally determine any question touching the guilt or innocence of the accused. *Accordingly, it is said in the books that the function of an examining magistrate is ministerial and not judicial.*"

The Court followed this doctrine in *In Re Mary, supra.* In *Degge v. Hitchcock*, 229 U. S. 171, the court said:

"It is true that the Post Master General gave notice and a hearing to the persons specially to be affected by the order and that in making his rul-

ing, he may be said to have acted in a quasi-judicial capacity. But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection. That fact *gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari.*"

It is to be noted that the power to hear and entertain such matters as were taken up in the *Degge* case, *supra*, were expressly granted by statute, yet the court said:

"The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a *judgment*, it was not subject to appear, writ of error, or *certiorari.*"

III. *Inasmuch as the prohibition agents serving the search warrant upon the appellant are not joined as parties in the above entitled action and were not officers of this court, the court has no jurisdiction to grant the prayer for restraining them.*

Lewis v. McCarthy, 274 Fed. 496;
In re Chin K. Shue, 199 Fed. 282;
U. S. v. Hee, 219 Fed. 1019.

IV. *In issuing a search warrant the commissioner does not act under the instructions of the District*

Court. In *In re Chin K. Shue,* 199 Fed. 284, the court said:

"No reason appears for saying that he acts by the court's authority in performing such functions. His authority to perform them comes from the statutes, independently of the court which appointed him."

Judge Neterer, in his opinion in the above entitled case, says:

"The relator invokes the original jurisdiction and 'prays a writ of certiorari,' an order of injunction against persons not parties to this action, and the impounding of papers, etc., seized under a search warrant issued by the respondent, 'a United States Commissioner,' and alleged to be in possession of the parties who executed the warrant.

"Certiorari is a writ having several purposes; one to enable a court of reviewing power to examine the action of an inferior court; another is to enable the Court to get further information in an action then pending before it for adjudication. L. M. A. & C. R. Co. v. L. T. Co., 78 Fed. 659. It is a proceeding appellate in the sense that it involves a limited review of the proceedings of an inferior jurisdiction, Basanat v. City of Jacksonville, 18 Fla. 529; and lies only to inferior courts and officers exercising judicial powers, and is directed to the Court, magistrate, or board exercising such powers, requiring the certification of the record in a matter already terminated. People v. Walter, 68 N. Y.

403; People v. Livingston County, 43 Barb. 232. Its function is not to restrain or prohibit, but to annul. Gault v. City and County of S. F., 122 Cal. 18 (43 Pac. 272). It is a revisory remedy for the correction of errors of law apparent upon the record, and will not lie where there is another remedy except for want of jurisdiction. Farmington River & Water Power Co. v. Co. Commrs., 112 Mass. 206; La Mar v. Co. Commrs., etc., 21 Ala. 772; Thompson v. Reed, 29 Iowa 117; Memphis & C. R. Co. v. Grannum, 11 So. 468 (96 Ala.); McAloon v. License Commrs. etc., 46 Atl. 1047; Saunders v. Sioux City Nursery Co., 24 Pac. 532 (6 Utah). The scope of the writ has been enlarged so as to serve the office of a writ of error. Degge v. Hitchcock, 229 U. S. 162. If this Court has power to issue the writ sought, it obviously could not, in this, an original proceeding against the respondent, 'a United States Commissioner * * *' enjoin strangers to this action, U. S. v. Maresca, 266 Fed. 713, or require parties not before the Court even though the warrant was issued to and executed by them, to surrender and deliver up property taken, nor direct an officer of this court to pursue such parties, and take from their possession documents, evidentiary or otherwise, which may have been wrongfully taken.

"The Court, no doubt, has power to supervise the conduct of its officers—Griffin v. Thompson, 43 U. S. 241—and a United States Commissioner, while not strictly an officer of the court, may to a degree be subject to its supervisory control. U. S. v. Allred, 155 U. S. 591. His powers grew from authority to take oaths and acknowledgments to

that of an examining and committing magistrate—Sec. 1014, Rev. Stats.; U. S. v. Devers, 125 Fed. 778; Todd v. U. S., 158 U. S. 278—and while so acting, discharged judicial functions and had 'no divided responsibility with any other officer of the government,' U. S. v. Schuman, No. 16237 Fed. Cases; U. S. v. Devers, supra. He performed quasi-judicial functions and possessed such powers as were especially conferred. U. S. v. Tom Wah, 160 Fed. 207. He has no power to punish for contempt. Ex perte Perkins, 29 Fed. 900; In Re Perkins, 100 Fed. 950 at 954. The Espionage Act confers special powers in providing for the issuance of search warrants and prescribes the procedure with relation thereto.

Sec. 10496¼-a, Comp. Stats.—'A search warrant * * * may be * * * issued by a judge of the United States District Court or * * * by a United States Commissioner.

"It is obvious that a complete procedure is provided. No supervisory power or appellate jurisdiction is given to the District Judge. If the Court may review, it must be because of inherent power. The power of the commissioner of the issuance of a search warrant is equal to that of the District Judge. The power of each emanates from a common source. The Congress has the power 'to constitute tribunals inferior to the Supreme Court.' U. S. Constitution, Art. 1, Sec. 8, Clause 9; Art. 3, Sec. 1. The power to create implies the power to limit the jurisdiction. U. S. v. Hudson, 11 U. S. 32 (7 Cranch). The Federal Court is of limited jurisdiction, and has no power except such as is

expressly granted or necessarily implied. Turner v. Bank of N. A., 4 Dell. 9. Within this limitation it is a court of general jurisdiction. Toledo S. L. & W. R. Co. v. Peruchie, 205 Fed. 472. The District Courts have power to issue writs not especially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principals of law. Comp. Stats., Sec. 1239. Rev. Stats. Sec. 716.

"Can a District Judge, without statutory authority 'agreeable to the usages and principles of law' by certiorari review a 'search warrant' proceeding of a United States Commissioner, who is given equal power by the Congress? If so, can one District Judge review the act of another District Judge in like manner? It is plain, however, that the Commissioner proceedings have not been concluded and that the relator has not exhausted his remedy before the Commissioner.

"The office and history of a United States Commissioner is clearly given by Judge Hough in U. S. v. Maresca, supra. While the Court has the right to issue the writ, In Re Chetwood, 165 U. S. at 462, Judge Hough in U. S. v. Maresca, supra, said:

" 'It does not follow that a certiorari must issue, and as against a magistrate exercising only arresting and committing powers it ought not to issue, and unless imposed by statute cannot issue under customary law, as is well and I think conclusively shown by Hagie, J., in Farrow v. Springer, 57 N. J. L. 353, (31 Atl. 215). There is no statutory imposition, in my opinion, it does not exist in this matter.'

"He also held that a United States Commissioner, under the present law, in issuing a search warrant exercised the powers of the District Court (10496¼-a, supra), and while so acting, 'was sitting in the District Court' and the law seems to so read. He also said at page 723:

" 'The view that this entire matter of issuing a search warrant and then directing the return of what was seized thereunder is a district court's proceeding, is confirmed by study of the nature and history of the case reported as Veeder v. United States, 252 Fed. 414' (certiorari refused 246 U. S. 675).

and that a writ of error would lie to the Circuit Court of Appeals from the Commissioner's act, and denied the motion to return property taken because the proceeding:

" '* * * was in the district court by a judicial officer, subordinate, but independent, sitting as a committing magistrate, having equal power with any Judge authorized to hold a District Court.'

"Judge Hand in U. S. v. Casino, 286 Fed. 976, at 979, after referring to U. S. v. Maresca, supra, held that the United States Commissioner, in issuing a search warrant, acted in a ministerial capacity, and the writ would be improper and at page 981 said:

" 'It is clear that certiorari, assuming that this court has power in a proper case to issue that writ (citing cases) is not necessary, and indeed, if the action of the commissioner be not judicial, the

common-law writ, which is all that could go in any event, would be improper.'

"The writ, if this Court has power to issue it, is not necessary, and in my opinion would be improper. Plaintiff relator has other adequate remedy.

"From any viewpoint of approach the petition must be denied."

In appellant's brief there is quite an extensive argument on the question whether the Commissioner exceeded his jurisdiction in issuing said search warrant. This question is not before the court for the reason that the Government entered a special appearance only for the purpose of objecting to the jurisdiction of the Court. Consequently, the merits of the case are not in issue. The proper remedy for the appellant in this case is on a motion to suppress, which rights he still has, and has not been denied them.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,

C. T. McKINNEY,
Assistant United States Attorney,
Attorneys for Appellee.

No. 4449

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEONARD CHENERY, as Administrator with the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff in Error,

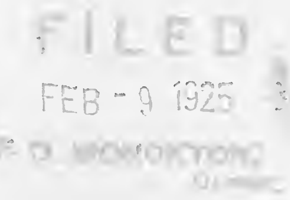
vs.

THE EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LIMITED,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. WALLACE & AMES, Mills Bldg., San Francisco, Calif.,

Attorneys for Plaintiff in Error.

Messrs. REDMAN & ALEXANDER, Aetna Bldg., San Francisco, Calif.,

Attorneys for Defendant in Error.

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

THIRD AMENDED COMPLAINT FOR RECOVERY UPON LIFE INSURANCE POLICY.

Now comes plaintiff above named and leave of Court having been first had and obtained, files this

his third amended complaint, and for cause of action against the defendant above named alleges:

I.

That at all times mentioned herein the defendant above named was and is a foreign corporation organized under the laws of the Kingdom of Great Britain, and qualified to do business as a foreign corporation in the State of California, with its principal place of business in said state, in the city and county of San Francisco; that said corporation has for its principal purpose the writing of Life and Accident Insurance, and at all times mentioned herein was and is engaged in the transaction of the business of Life and Accident Insurance in the State of California.

II.

That on or about the 14th day of June, 1917, Leonard Chenery and defendant entered into a contract of insurance, whereby [1*] the defendant on said date made and issued its policy of insurance in writing bearing No. 389194 insuring Leonard Chenery under the provisions of said policy upon his life for the principal sum of Seven Thousand Five Hundred Dollars ($7,500.00) and against accident and also insuring Edith Chenery, the sole beneficiary named in said policy upon her life in the sum of Five Thousand Dollars ($5,000.00) and against accident, as is more particularly set forth in said policy of insurance, copy of which is attached hereto, marked Exhibit "A" and made a part hereof as if herein expressly stated; that

*Page-number appearing at foot of page of original certified Transcript of Record.

thereafter said policy of insurance was renewed from year to year by the said defendant and the plaintiff herein by written agreement and certificate of renewal showing date of payment of premium and date of renewal; that on the 23d day of June, 1922, said policy was so renewed by the defendant, and the premium required to be paid for such renewal was paid by the plaintiff herein, and said policy of insurance was continued in force and effect from noon on the 5th day of July, 1922, up to noon on the 5th day of July, 1923, as more particularly appears from the certificate of renewal of said policy, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof with the same force and effect as if herein expressly stated; that thereafter, to wit, on the 25th day of June, 1923, said policy was so renewed by the defendant, and the premium required to be paid for such renewal was paid by the plaintiff herein, and said policy of insurance was continued in force and effect from noon on the 5th day of July, 1923, up to noon on the 5th day of July, 1924, as more particularly appears from the certificate of renewal of said policy, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof with the same force and effect as if herein expressly stated.

III.

That from and after the said 14th day of June, 1917, Edith [2] Chenery, also known as Edith P. Chenery, was and continued to be the sole beneficiary under the terms and provisions of said policy

of insurance and extensions thereof up to and including the 16th day of June, 1923, the date of her death as hereinafter set out.

IV.

That Edith P. Chenery died on or about the 16th day of June, 1923; that thereafter proceedings were had for the probate of the estate of said Edith P. Chenery in the Superior Court of the State of California, in and for the city and county of San Francisco, and on the 12th day of July, 1923, the plaintiff herein was duly appointed and qualified as administrator with the will annexed of Edith P. Chenery, deceased; that the plaintiff at all times since has been and now is the duly qualified and acting administrator with the will annexed of the estate of Edith P. Chenery, deceased.

V.

That Edith P. Chenery, the beneficiary referred to under said provision, at the time of her death was over the age of eighteen years, and under the age of sixty years, and at the time of her death was in sound condition mentally and physically; that the said Edith P. Chenery met her death solely and independently of all other causes, through external, violent and accidental means, and not by suicide, while a passenger in a public conveyance provided by a common carrier for passenger service in the following manner, to wit: That on said 16th day of June, 1923, the said Edith P. Chenery was a passenger for hire in a motor bus [3] operated by one J. Ward as a public conveyance and common carrier upon a regular route between the

towns of Clevedon and Papakura, in the State of New Zealand, Commonwealth of Australia, for a regular rate of hire; that while said public conveyance was being operated as aforesaid upon said route, and while said Edith P. Chenery was a passenger and was in said public conveyance, said public conveyance fell over an embankment into a stream of water at the bottom thereof and the said Edith P. Chenery was crushed and drowned in said stream of water while said Edith P. Chenery was a passenger and was in said conveyance.

VI.

That within thirty (30) days from and after the 16th day of June, 1923, the date of the death of said beneficiary, the plaintiff gave written notice and proof of said death to the defendant; that more than sixty (60) days had elapsed since the giving of said written notice first hereinabove referred to, and that more than sixty (60) days had elapsed since the furnishing of said proof of death hereinabove referred to before the filing of the original complaint in this action against said defendant on the 27th day of December, 1923; that the defendant on the 18th day of December, 1923, in writing notified this plaintiff that it denied all liability under said policy by reason of said death of said Edith P. Chenery; that the plaintiff herein has paid all of the premiums required by him to be paid at the times and in the manner required in said policy of insurance and said written extensions thereof; [4] that this policy has never

been cancelled by the defendant by written notice delivered to the assured and/or mailed to him or in any manner or at all, but that the said policy and said extensions thereof were in full force and effect on said 16th day of June, 1923, and ever since have been and now are in full force and effect.

VII.

That by reason of said death a loss has occurred under the provisions of said policy of insurance in the sum of Five Thousand Dollars ($5,000.00); that plaintiff has demanded that the defendant pay said loss, but the defendant has wholly refused and neglected, and still does refuse and neglect to pay to the plaintiff the said sum of Five Thousand Dollars ($5,000.00) or any part thereof, and the whole of said sum is now due, owing and unpaid to plaintiff.

VIII.

That said Leonard Chenery, both as an individual and as the administrator with the will annexed of the estate of Edith P. Chenery, deceased, has duly performed all of the conditions on his part contained in said policy required by him to be kept and performed.

WHEREFORE plaintiff prays judgment against the defendant in the sum of Five Thousand Dollars ($5,000.00), together with interest thereon from and after the 16th day of June, 1923, together with costs of this action.

WALLACE & AMES,
Attorneys for Plaintiff. [5]

State of California,
City and County of San Francisco,—ss.

Leonard Chenery, being duly sworn, deposes and says:

That he is the plaintiff in the above action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated to be upon information and belief, and as to such matters he believes it to be true.

LEONARD CHENERY.

Subscribed and sworn to before me this 19th day of April, 1924.

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

(Here follow Exhibits "A," "B" and "C," which are incorporated in the bill of exceptions.)

Service and receipt of a copy of the within 3d amended complaint is hereby admitted this 19th day of April, 1924.

REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 21, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator, etc.,
Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,
Defendant.

ANSWER TO THIRD AMENDED COMPLAINT.

Comes now the defendant and answering the third amended complaint denies and alleges as follows:

1. Denies that the alleged policy insured Edith Chenery upon her life in the sum of five thousand dollars ($5,000.00) or any sum, and against or against accident, and in that behalf alleges the true fact to be that the insurance, if any, accorded to Edith Chenery is based upon Section H of the policy of insurance referred to in the third amended complaint, said Section H of said policy being entitled "Beneficiary Benefits"; and defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer whether said Edith Chenery qualified for said Beneficiary Benefits pursuant to said Section H of the policy,

and therefore and upon that ground denies that she qualified for the alleged or any benefits under said Section H or that said beneficiary was insured pursuant to said Section H.

2. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the [7] allegations contained in paragraph IV of the third amended complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

3. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations of paragraph V of the third amended complaint that at the time of her death she was over the age of eighteen and under the age of sixty years and at the time of her death or at any time was in sound condition mentally and physically and that said Edith P. Chenery met her death solely and independently of all other causes through external, violent and accidental means and not by suicide, and therefore and on that ground denies each and every of said allegations; and denies that she met her death while a passenger in a public conveyance or provided by a common carrier for passenger service either as alleged or otherwise; and denies that on the 16th day of June, 1923, or at any time, said Edith P. Chenery was a passenger for hire in a motor bus operated by one J. Ward, or any one, as a public conveyance and common carrier, or as a public conveyance or common carrier upon a regular or any route between the Towns of Clevedon and Papa-

kura, in the State of New Zealand, Commonwealth of Australia, or any place, for a regular or any rate of hire or otherwise. And denies that she was at said time a passenger in a motor bus operated by one J. Ward or any person as a public conveyance and, or common carrier upon a regular or any route between the Towns of Clevedon and Papakura in the State of New Zealand, Commonwealth of Australia, and for or for a regular or any rate of hire; and said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations of the third amended complaint that on the 16th day of June, 1923, the said [8] Edith P. Chenery was a passenger for hire in a motor bus operated by one J. Ward, either at the alleged or any place, and for or for a regular rate of hire, and that while said bus was being operated upon the alleged route and while said Edith P. Chenery was a passenger and was on the conveyance, said conveyance fell over an embankment into a stream of water at the bottom thereof and the said Edith P. Chenery was crushed and drowned in said stream of water while said Edith P. Chenery was a passenger and was in said conveyance, and therefore and upon that ground denies each and every of said allegations; and denies that the alleged conveyance was a public one and denies that said alleged conveyance was being operated as alleged upon a regular route; and denies that Edith P. Chenery was a passenger in a public conveyance and denies that the alleged conveyance which is alleged to have fallen over the

embankment was a public conveyance, or operated by a common carrier.

4. Denies that within thirty days from and after or from or after the 16th day of June, 1923, the date of the alleged death of said beneficiary, plaintiff gave written notice and, or proof of any death caused in any manner covered by the policy of insurance and denies that more than sixty days had elapsed since the furnishing of written notice and, or proof of death caused in any manner covered by the policy of insurance before the filing of the original complaint against the defendant on the 27th day of December, 1923, or at any time.

5. Denies that by reason of said death a loss has occurred under the provisions or any provision of said policy of insurance, or at all, in the sum of five thousand dollars ($5,000.00), or any sum, and denies that the defendant has neglected to pay the alleged loss or any loss, and, or does still neglect to pay to plaintiff the sum of five thousand dollars [9] ($5,000.00) or any sum, and denies that the whole or any part of said sum is now due, owing and unpaid, or now or at all due or owing or unpaid to the plaintiff. And defendant denies that there is any sum or amount whatsoever due or owing or unpaid or payable from it to the plaintiff, and denies that the plaintiff has any claim or demand against the defendant or that said plaintiff is entitled to any sum or amount from the defendant whatsoever.

6. Denies that said Leonard Chenery both as an individual and as or as the administrator with the

will attached of the estate of Edith P. Chenery, deceased, or othewise or at all, has duly or at all performed all of the conditions on his part contained in said policy required by him to be kept and performed or kept or performed.

WHEREFORE, defendant prays to be hence dismissed with its costs.

REDMAN & ALEXANDER,
Attorneys for Defendant. [10]

State of California,
City and County of San Francisco,—ss.

C. V. Jensen, being first duly sworn, deposes and says: That he is a member of Chas. J. Okell & Co., General Agents in and for the State of California of the defendant in the above-entitled action and that none of the other officers of the defendant corporation is in the State of California; that he has read the foregoing answer to the third amended complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein alleged on information and belief and that as to such matters he believes it to be true.

C. V. JENSEN.

Subscribed and sworn to before me this 16th day of June, 1924.

[Seal] OLIVER DIBBLE,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer to third amended complaint admitted this 16th day of June, 1924.

WALLACE & AMES,
Attorneys for Plaintiff.

[Endorsed]: Filed June 16, 1924. Walter B. Maling, Clerk. [11]

(Title of Court and Cause.)

VERDICT.

We, the jury, find in favor of the defendant.

SAMUEL BRECK,
Foreman.

[Endorsed]: Filed November 11, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

(Title of Court and Cause.)

JUDGMENT ON VERDICT.

This cause having come on regularly for trial upon the 11th day of November, 1924, being a day in the November, 1924, term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein. Alden Ames and Bradley L. Wallace, Esqrs., appearing as attorneys for plaintiff and Jewel Alexander, Esq., appearing as attorney for defendant; and the trial having been proceeded with and oral and documentary evidence upon behalf of the plaintiff having been introduced and the defendant having moved the Court to instruct the jury to return a verdict in its favor and the Court having granted said motion and the jury having returned the following verdict which was ordered recorded, namely: "We, the

jury, find in favor of the defendant. Samuel Breck, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that defendant go hereof without day and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at $43.20.

Judgment entered November 11th, 1924.

WALTER B. MALING,
Clerk. [13]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

BILL OF EXCEPTIONS ON BEHALF OF PLAINTIFF.

BE IT REMEMBERED, that on Tuesday, the 11th day of November, 1924, the above-entitled ac-

tion came on regularly for trial before the above-entitled court and a jury, Honorable George M. Bourquin presiding, and the plaintiff herein being represented by Alden Ames and Bradley L. Wallace of the firm of Wallace & Ames, attorneys at law, and the defendant being represented by Jewel Alexander of the firm of Redman & Alexander, attorneys at law, thereupon the following proceedings were had and taken:

After the impanelment of a jury, Alden Ames, as counsel for plaintiff, made the opening statement, and Jewel Alexander made the opening statement on behalf of defendant.

The following witnesses were sworn and depositions read:

DEPOSITION OF LEONARD CHENERY, FOR PLAINTIFF.

LEONARD CHENERY, called for the plaintiff, sworn.

Mr. AMES.—Q. Mr. Chenery, you are the plaintiff in this action? A. Yes.

Q. And you are now and were at the time of the commencement of this action the administrator with the will annexed of the estate of Edith P. Chenery, deceased? A. Yes. [14]

Mr. AMES.—I offer in evidence at this time a certified copy of letters of administration with will annexed of the estate of Edith P. Chenery, deceased.

Mr. ALEXANDER.—No objection.

(The document was here marked Plaintiff's Exhibit 1.)

(Deposition of Leonard Chenery.)

Mr. AMES.—Q. Mr. Chenery, in July, 1917, you took out a policy—

Mr. ALEXANDER.—The policy is also admitted, your Honor.

Mr. AMES.—Very well. We will offer it in evidence, and ask that it be marked Plaintiff's Exhibit 2, insurance policy No. 389,914, of the Employers' Liability Assurance Corporation. You will admit, Mr. Alexander, that the premiums on that policy have all been paid to date?

Mr. ALEXANDER.—That is admitted.

(The document was here marked plaintiff's Exhibit 2.)

Mr. AMES.—Q. Edith P. Chenery, the beneficiary named in that policy, was your wife?

A. Yes, sir.

Q. And she died on or about the 16th day of June, 1923? A. Yes, sir.

Q. At that time she was in New Zealand, was she? A. Yes, sir.

Q. She left here shortly before that date, did she?

A. She left in April.

Q. In April of the same year? A. Yes.

Q. At the time that she left, that is the last time you saw her, she was in good health, and in sound condition, both mentally and physically? A. Yes.

Q. At the time of her death she was approximately of the age of around 55, was she? A. Yes.

Q. You were notified of her death by cable, were you not? A. Yes.

Q. And shortly thereafter you notified Charles J.

(Deposition of Leonard Chenery.)

Okell & Co., the agents under this policy, of the loss, did you? A. Yes.

Mr. AMES.—I will ask counsel to produce the original letter [15] of July 6, 1923.

The COURT.—I understand counsel admits all these matters.

Mr. ALEXANDER.—There is no dispute as to them.

Mr. AMES.—Then you will stipulate, Mr. Alexander, that all matters relating to the giving of notice of loss and the presentation of proper proof were made by this plaintiff, and that there is no dispute on any point in connection with that feature of the case?

Mr. ALEXANDER.—I think that request is too broad. We admit that notice was given, and the forms of proof required by the policy were tendered to the company. We do not dispute that fact.

The COURT.—Very well.

Mr. AMES.—And you admit, also, that on or about the 18th day of December, 1923, you denied liability on this policy in writing?

Mr. ALEXANDER.—Yes, we did, pursuant to the terms of the letter you have.

Mr. AMES.—I offer this letter in evidence, dated December 18, 1923, from Charles J. Okell Co. The signature on that letter, Mr. Alexander, was by a duly authorized agent?

Mr. ALEXANDER.—A duly authorized agent of the defendant corporation; there is no question about that.

(Deposition of Leonard Chenery.)

(The document was here marked Plaintiff's Exhibit 3.)

Mr. AMES.—Q. And you are now claiming by virtue of your representation of the estate of Edith P. Chenery the loss under this policy due to her death?

Mr. ALEXANDER.—We object to that question as immaterial, irrelevant and incompetent, and calling for the legal conclusion of the witness.

The COURT.—He may answer.

A. Yes.

The COURT.—I understand from counsel there is only one issue in the case, and that is surrounding the circumstances of the death, whether it is one that brings the case within the conditions of the policy. [16]

Mr. AMES.—Yes.

Q. As to what happened in New Zealand, you are not able to testify? A. No.

Mr. AMES.—That is all.

Mr. ALEXANDER.—No questions.

DEPOSITION OF HILDA M. GRAVES, FOR PLAINTIFF.

HILDA M. GRAVES, called for the plaintiff, sworn.

Mr. AMES.—Q. Mrs. Graves, your name was formerly Mrs. Hilda Hart? A. It was.

Q. And that is the name that you were known by in the year 1923. A. Yes.

Q. You knew Mrs. Chenery during her lifetime?

(Deposition of Hilda M. Graves.)

A. I did.

Q. You are no relative of the family at all, are you? A. No.

Q. Were you a visitor at the home of Mrs. Humphries Davies in New Zealand during the month of June, 1923? A. I was.

Q. And at that time was Mrs. Chenery there?

A. Yes.

Q. On that occasion you, together with Mrs. Chenery, left the home of Mrs. Humphries Davies to go to the railroad station, didn't you? A. We did.

Q. That was on the 16th day of June, 1923?

A. Yes.

Q. On what conveyance did you go?

A. We started in a conveyance owned by Mrs. Davies, in a cart.

Q. A horse-drawn cart? A. Yes.

Q. That was owned by Mrs. Davies? A. Yes.

Q. Where did you go in that conveyance?

A. Well, I don't know the name of the place where we were met by this Ford—somewhere along the road.

Q. Who met you on the road? A. Mr. Ward.

Q. And he was operating what?

A. A Ford car.

Q. Do you know whether or not it was his business to carry passengers? A. Yes, it was. [17]

Q. That was his regular business, was it?

A. Yes.

Q. Who was in the party besides yourself and Mrs. Chenery?

(Deposition of Hilda M. Graves.)

A. A trained nurse and a lawyer, Mr. Spence.

Q. And the nurse's name was Miss Edge?

A. Yes.

Q. On this occasion Mrs. Chenery was in sound health both mentally and physically wasn't she?

A. Yes.

Q. You got to Clevedon didn't you in this Ford?

A. Yes.

Q. How far from the place where you took the Ford was Clevedon, approximately?

A. I think we were in the Ford half or three-quarters of an hour.

Q. Was it about six miles? A. Possibly.

Q. At Clevedon you changed to a different conveyance, did you? A. Yes.

Q. What kind of a conveyance did you get on?

A. On to a motor-bus.

Q. Will you describe to the jury that motor-bus?

A. It had, as I recollect, four seats; there were three of us in the back seat. The main part of the car was filled with luggage. On the front seat sat Mr. Spence and the driver, Mr. Ward; it was pinned in with curtains on either side.

Q. And you and Mrs. Chenery and Miss Edge were sitting in the rear seat? A. In the rear seat.

Q. Was this motor-bus like an ordinary car or was it changed in some way?

A. Well, it looked like a very large automobile to me, what we would call a motor-bus.

Q. A motor-bus as distinguished from a pleasure car: Is that what you mean? A. Yes, sir.

(Deposition of Hilda M. Graves.)

Q. And there was an extra seat built in it?

A. The seats were very wide; they held three people.

Q. And there was an extra seat in the middle was there? A. Yes, as I recall it.

Q. In other words, its appearance was distinctly that of what we call a motor-bus as distinguished from a private car: Is that correct?

A. Yes. [18]

Q. I don't wish to lead you, Mrs. Graves, but I want to bring these matters out. Did you have any conversation with Mr. Ward with reference to this motor-bus that you got on at Clevedon?

Mr. ALEXANDER.—We object to that as being immaterial, irrelevant and hearsay.

The COURT.—What is the object of it?

Mr. AMES.—The object is to prove that this is the bus that he regularly used on this run and so admitted.

Mr. ALEXANDER.—We object to that as hearsay and not binding on the defendant.

The COURT.—I am inclined to think so. Objection sustained.

Mr. AMES.—Your Honor, it is the statement of the man, himself, whose business it was.

The COURT.—But you could have taken his deposition.

Mr. AMES.—That is perfectly true.

The COURT.—Show me some authority for it. I don't know of any. It sounds purely hearsay to the Court. Objection sustained.

Mr. AMES.—Q. Do you know as a fact, or don't

(Deposition of Hilda M. Graves.)
you know, that this man had a regular run connecting with the railroad train?

Mr. ALEXANDER.—Objected to as immaterial, irrelevant and incompetent, and it has not been shown whether she knows the fact or not.

Mr. AMES.—Q. Do you know the fact that he had a regular run connected with the railroad train?

A. I do.

Mr. ALEXANDER.—I object to that unless it is shown that she knows of her own knowledge and not by hearsay.

The COURT.—She has answered she knows.

Mr. AMES.—Q. Has he?

Mr. ALEXANDER.—Before that question is answered may I ask a question as to the means of her knowledge?

The COURT.—You may. [19]

Mr. ALEXANDER.—Q. Do you know anything about that of your own knowledge, except the particular ride you were on? A. No.

Q. Only what was told you by others?

A. What the man, himself, told me that day.

Mr. ALEXANDER.—We object to the testimony as hearsay, and not of her own knowledge.

The COURT.—Objection sustained.

Mr. AMES.—Q. The entire party went on to this motor-bus at Clevedon? A. Yes.

Q. Will you tell the jury what happened after that?

A. We drove I suppose half or three-quarters of a mile from Clevedon in this bus, and it was dark,

(Deposition of Hilda M. Graves.)

half-past five, and raining, and we slipped over an embankment and the motor-bus overturned and we went into a river. After that, I don't know just what happened for some time.

Q. You were rendered unconscious at the time?

A. Yes.

Q. After you regained consciousness did you see Mrs. Chenery? A. No.

Q. Do you know what happened to Mrs. Chenery? A. Yes.

Q. What happened?

Mr. ALEXANDER.—You may state that. She died. We concede that.

Mr. AMES.—You concede she died by accidental means, through external violence?

Mr. ALEXANDER.—No, I do not concede that. I concede she died.

Mr. AMES.—Then I have to go into the matter.

Q. What happened to Mrs. Chenery?

Mr. ALEXANDER.—She stated she did not know.

The COURT.—Q. Do you know?

A. I know she was killed.

Mr. AMES.—Do you know how she was killed?

A. From the overturning of this conveyance.

Q. Did the conveyance overturn into the water?

A. Into the water. [20]

Q. And she was drowned, in fact, in the water, wasn't she—crushed and drowned? A. Yes.

Q. Do you know how long she lived after that?

A. Not many minutes.

(Deposition of Hilda M. Graves.)

Q. In other words, so far as you know, she was dead when she was taken out from under the car?

A. Yes.

Q. Of course, this thing happened very rapidly, and you were rendered unconscious at the moment?

A. Yes.

Cross-examination.

Mr. ALEXANDER.—Q. Was she crushed and drowned, or crushed, or drowned?

A. I don't know.

Q. You were on the Davies Ranch, were you, when Mr. Ward, the driver was called for? A. I was.

Q. Did they telephone for him to come?

A. Yes.

Q. Who telephoned? A. Mrs. Davies.

Q. And he came pursuant to that telephone message? A. Yes.

Q. Were you transferred into a larger machine at Clevedon, or outside of Clevedon?

A. At Clevedon.

Q. Who requested the change to be made?

A. The driver, himself.

Q. Had you, or had Mrs. Chenery complained of being in cramped quarters in the little Ford?

A. Not until we changed.

Mr. ALEXANDER.—That is all.

Mr. AMES.—Your Honor, may I have an exception to your Honor's rulings sustaining the objections of counsel?

The COURT.—Surely.

DEPOSITION OF JESSIE L. P. BERRY, FOR PLAINTIFF.

JESSIE L. P. BERRY, called for the plaintiff, sworn.

Mr. AMES.—Q. Mrs. Berry, you were Mrs. Chenery's sister? A. Yes. [21]

Q. You have visited your other sister, Mrs. Davies, in New Zealand, on several occasions, have you?

A. Yes.

Q. How long have you stayed down there at a time?

A. The last time I went down in November and I stayed until October.

Q. Of what year? A. That was last year.

Q. So you were there eight months? A. Yes.

Q. And you were there on other occasions?

A. Yes.

Q. How long did you stay on the previous occasion?

A. I was there six or seven months, I think.

Q. And during the time you were there you were at Mrs. Davies' ranch, were you? A. Yes.

Q. Where is that with reference to Clevedon?

A. I suppose it is about nine miles from Clevedon.

Q. Where is the nearest railroad junction?

A. Papakura.

Q. Do you know of your own knowledge the occupation of this man Ward? A. Yes.

Q. What was his occupation?

(Deposition of Jessie L. P. Berry.)

A. Well, he motored from Clevedon to Papakura, taking passengers to and from the trains.

Q. To and from the trains?

A. Yes, and even to the ranch.

Q. Was it his custom to get people from the ranches and take them to trains?

A. Yes, and he has taken me from there.

Q. Do you know whether or not he serves the public generally?

Mr. ALEXANDER.—We object to that as immaterial, irrelevant and incompetent, and calling for the witness' conclusion. It is a question of law.

The COURT.—It is leading, for one thing. You may ask her details to find out what she knows. Objection sustained.

Mr. AMES.—Exception.

Q. Mrs. Berry, what do you know with reference to the occupation of Mr. Ward, as to whether or not he serves the public generally? [22]

Mr. ALEXANDER.—We object to that upon the same ground. We have no objection to the lady stating what she observed. What she learned by hearsay is not competent.

The COURT.—She may answer. Objection overruled.

A. He serves the public generally, because I always paid him my fare.

Mr. ALEXANDER.—I move that that be stricken out as not responsive, and it is a legal question, rather than stating what she knows as to the facts.

(Deposition of Jessie L. P. Berry.)

The COURT.—I think so. The answer will be stricken.

Mr. AMES.—Exception.

Q. Have you ever known Mr. Ward to refuse to serve anybody? A. Never.

Q. Where does he keep his stand in Papakura?

A. He usually stands in front of a little drygoods store there, across the street from his home, I think it is; it is near the postoffice.

Q. In Papakura? A. No, in Clevedon.

Q. I asked you about Papakura.

A. Just as near to the train as he can get there.

Q. What does he do at the station when the train arrives? A. He solicits for passengers.

Q. And you have seen him do that yourself?

A. Yes.

Q. Solicits passengers for where?

A. Clevedon and along the road from Papakura to Clevedon; and he picks up passengers on the way.

Q. And you say he solicits passengers to go from Papakura, at the railroad station, to Clevedon; does he also solicit passengers at Papakura, at the railroad station, to the ranches in and around Clevedon? A. He does when he is telephoned for.

Q. I am asking you if he does that at Papakura.

A. Yes, he does.

Q. I am asking you whether or not at Papakura, at the railroad junction, he solicits for business to take passengers not only to Clevedon, but also to the ranches in that neighborhood? [23]

(Deposition of Jessie L. P. Berry.)

A. I know he has taken me to the ranch; I cannot answer for anyone else.

Q. He is there soliciting anyone who comes?

A. Yes, at all trains.

Q. As a matter of fact, is there any other way for a person who has no private automobile of his own to get from the railroad station to Clevedon?

Mr. ALEXANDER.—We object to that on the ground that it is immaterial, irrelevant and incompetent, and has no bearing on any issue in this case.

The COURT.—You may ask her whether there are any other lines of motor-busses, or anything of that sort. Objection sustained.

Mr. AMES.—Q. Are there any other lines of motor-busses?

A. Yes, there is an opposition line.

Q. And there is competition between the two?

A. Yes.

Q. And it is quite a struggle, isn't it, to get passengers—

Mr. ALEXANDER.—We object to that as being outside the issues in the case.

The COURT.—Objection sustained.

Mr. AMES.—Exception.

Q. He also, does he not, solicits that trade going in the opposite direction, that is, to the railroad train?

A. You mean from Clevedon out the ranch way?

Q. Yes.

A. Yes. He operates that way as well. He has taken me from there.

Q. He has taken you several times? A. Yes.

(Deposition of Jessie L. P. Berry.)

Q. And he has a regular fare, has he?

Mr. ALEXANDER.—We object to that as leading. I hate to interpose the objection, but counsel persists in leading questions.

The COURT.—Yes, but it is probably harmless. Change the form of the question.

Mr. AMES.—Q. What is the fare?

A. As nearly as I can remember I paid 30 shillings from the ranch to Clevedon. [24]

Q. And you have paid that more than once?

A. I think only once.

Q. That is, you, yourself, personally? A. Yes.

Q. Do you know whether or not that is his regular fare? A. I could not tell you.

Q. You don't know that? A. No.

Cross-examination.

Mr. ALEXANDER.—Q. Your experience was based on your own special arrangement with the taximan, wasn't it? A. Yes—

Mr. AMES.—Just a moment. I object to that as assuming something not in evidence.

Mr. ALEXANDER.—I withdraw the question.

Q. Is it not a fact that the driver who took you to the ranch did so by reason of a special contract you made with him?

Mr. AMES.—I object to that as assuming something not in evidence, that there was a special contract, and also calling for the conclusion of the witness as to what is or is not a special contract.

The COURT.—This is cross-examination; objection overruled.

(Deposition of Jessie L. P. Berry.)

Mr. AMES.—Exception.

A. Do you mean did I telephone to him?

Mr. ALEXANDER.—Q. Yes; did you make a special bargain with him to get out?

A. Oh, yes, naturally.

Q. And you don't know what he does with other people, do you? A. It is the same thing.

Q. They make bargains with him? A. Yes.

Q. The railroad is at Papakura, isn't it?

A. Yes.

Q. There is no railroad at Clevedon, is there?

A. No.

Q. And, consequently, he is not at the railroad station at Clevedon soliciting fares?

A. There is no railroad station there.

Q. There is none there. You made a mistake in your answer, and I wanted to straighten it out. Now, about the Humphries Davies ranch you spoke about, do you know the directions down there—east, or west? A. I couldn't tell you. [25]

Q. Suppose you were going from Auckland, you go from Auckland to Papakura? A. Yes.

Q. You get off the train at Papakura? A. Yes.

Q. Then the highway runs from Papakura to Clevedon? A. Yes.

Q. The Davies ranch is not on the road from Papakura to Clevedon, is it? A. No.

Q. It is further on, some nine miles beyond Clevedon? A. Yes.

Redirect Examination.

Mr. AMES.—Q. When you answered counsel's

(Deposition of Jessie L. P. Berry.)

question with reference to what he called a special contract, you don't mean to infer by that that this man does not carry everybody, do you?

A. Oh, yes, he carries anyone who telephones him.

Mr. ALEXANDER.—I move that the answer be stricken out as not responsive.

The COURT.—Answer it "Yes" or "No." Do you mean to infer by that that he does not carry everybody? A. I say, yes, he carries anyone.

The COURT.—The answer will stand.

Mr. AMES.—Q. He has a regular depot in Clevedon, too, has he not?

A. I suppose you would call it that. He has a stand there, a place where we go to get him; it is near the postoffice.

Q. And your understanding is that he will go and serve anyone, even those out in the outlying ranches?

Mr. ALEXANDER.—We object to that. What she understands is not competent.

The COURT.—Objection sustained.

Mr. AMES.—Exception. That is all.

Recross-examination.

Mr. ALEXANDER.—Q. Do you know whether he has a garage in Clevedon?

A. I could not tell you.

Q. You couldn't say? A. No. [26]

The COURT.—Q. Did I understand you to say that for the nine miles from the ranch to Clevedon he charged you 30 shillings?

A. No, the full distance, to Papakura.

(Deposition of J. Ward.)

Mr. AMES.—I ask that the depositions be opened, your Honor.

The COURT.—Let them be opened.

Mr. AMES.—I offer in evidence and will read to the jury the deposition of J. Ward, witness on behalf of plaintiff, taken pursuant to commission regularly issued out of this court.

The COURT.—Any objection to the form, or anything?

Mr. ALEXANDER.—No, your Honor.

The COURT.—Proceed with the deposition. All these details are not necessary.

Mr. AMES.—It is stipulated that the deposition is in the proper form.

DEPOSITION OF J. WARD, FOR PLAINTIFF.

Thereupon counsel read the deposition of J. WARD, a witness duly sworn and called on behalf of plaintiff.

Direct Interrogatories.

Q. What is your name and present address?

A. John Massey Ward.

Q. What is your occupation?

A. Motor proprietor.

Q. What was your occupation in the month of June, 1923? A. Motor proprietor.

Q. If you carried on your business under a name other than your own, state what that name was.

A. Roberts & Ward.

Q. How long had you been engaged in that business? A. Five years.

(Deposition of J. Ward.)

Q. Did you know Mrs. Edith P. Chenery prior to her death? A. No.

Q. On what day did Mrs. Edith P. Chenery meet her death? A. June 16, 1923.

Q. On that day were you in the business of operating a motor bus or busses for hire to the public? A. Yes. [27]

Q. Between what towns did you operate your motor bus or busses?

A. Clevedon and Papakura.

Q. Describe in detail the kind of a bus that you used in carrying passengers from Clevedon to Papakura.

A. Dodge passenger-car lengthened to add seat in center for extra passengers.

Q. How many passengers did it carry?

A. Nine comfortably.

Q. Did you charge a regular rate of hire for passengers between these two towns, and if so, what was your charge per passenger?

A. Three shillings single fare, six shillings return.

Q. Did you make regular trips between these two towns? A. Yes.

Q. At what town did your route connect with the railroad? A. Papakura.

Q. Were you in the business of conveying between these two towns any passengers for hire who should apply to you for carriage between these points? A. Yes.

Q. Did you serve the public in general?

(Deposition of J. Ward.)

A. Yes.

Q. What, if anything, did you carry upon your motor-bus in addition to passengers?

A. Parcels or small merchandise.

Q. Was it your business to deliver packages, bread, newspapers, baggage or any other articles and if so, what articles did you usually carry?

A. Small merchandise.

Q. Did your motor-bus travel over a regular route between Clevedon and Papakura?

A. Yes.

Q. Do you know Mr. George Humphreys-Davies?

A. Yes.

Q. If so, where does he live and how long have you known him?

A. Sandspit, nine miles from Clevedon. Have known him several years.

Q. Do you know his wife, Mrs. Ethel Humphreys-Davies? A. Yes.

Q. If so, where does she live and how long have you known her?

A. Sandspit, nine miles from Clevedon. Have known her several years.

Q. On the date of the death of Mrs. Chenery, where did you first see Mrs. Edith P. Chenery?

A. At Whakatiri, six miles from Clevedon, where I went to pick her up, June 16, 1923. [28]

Q. Who requested you to call for her?

A. She did by telephone.

Q. Where did you go to call for her?

A. At Whakatiri.

(Deposition of J. Ward.)

Q. Was Edith P. Chenery on the date mentioned a passenger in your motor-bus?

A. Yes, but not on the regular Clevedon-Papajura run.

Q. Where did you take Mrs. Edith P. Chenery after she left the home of Mr. and Mrs. Humphreys-Davies?

A. I took her from Whakatiri to the place of the accident.

Q. Who was with her?

A. Mrs. Hart, Mr. Spence, and a nurse whose name I cannot recall.

Q. Upon what conveyance did you carry this party from the residence of Mr. and Mrs. Humphreys-Davies to the town of Clevedon?

A. I carried them from Whakatiri to Clevedon in a Ford car, and Clevedon to the place of accident in a Dodge car.

Q. Did you at that town transfer your passengers to another vehicle? If so, to what vehicle?

A. Yes. To a Dodge car.

Q. How many passengers could ride in that motor-bus? A. Nine.

Q. What was the arrangement with your passengers as to the payment of fare?

A. As this was a special trip the charge would have been one pound fifteen shillings.

Q. Was that the rate for hire that you ordinarily charge?

A. From Whakatiri is a special fare, and a special fare rules after the usual run from Clevedon

(Deposition of J. Ward.)

to Papakura. The ordinary fare from Whakatiri to Clevedon is fifteen shillings and from Clevedon to Papakura is three shillings.

Q. When they got into your motor-bus at Clevedon, was there room for any additional passengers?

A. On account of passengers' luggage there was not room for anyone else.

Q. What luggage was carried upon the motor-bus?

A. Several bags and hampers. I do not remember the exact amount.

Q. Did you on that occasion have anything to deliver along the route such as newspapers, bread, etc.?

A. I had one loaf of bread and one newspaper. [29]

Q. If so, what did you have and where was it to be delivered?

A. I had one loaf of bread and one newspaper. They were not delivered.

Q. What route did you take between Clevedon and Papakura? A. Main road.

Q. Was this the regular route that you took for the purpose of carrying passengers to Papakura?

A. Yes.

Q. On June 16th, 1923, did anything unusual occur? If so, describe in detail exactly what took place.

A. Yes. While taking Mrs. Chenery and others to Papakura from Clevedon my car capsized, which resulted in the death of Mrs. Chenery.

(Deposition of J. Ward.)

Q. At the time of this occurrence, was Mrs. Edith P. Chenery a passenger for hire in your motor-bus? A. Yes.

Q. State in detail how Mrs. Edith P. Chenery met her death.

A. As I came around a corner to the place the accident happened, I saw the headlights of another car approaching. I dimmed my lights but the approaching car pulled up to let a passenger out with its lights full on. I put my lights on bright again to draw their attention to my car, and then dimmed them, but they still left their headlights on, and at that time another car approached with its headlights full on. It also pulled up beside the other car, and as I couldn't see where I was going I stopped. I applied my brakes and was waiting to see what they intended doing, my headlights were still dimmed and theirs were still full on. While I was waiting to see what they intended doing, the bank gave way with my car, which caused it to capsize into the creek. I remember very little after the car capsized, as I was pinned under the driving wheel of the car and pulled out in a semi-conscious condition.

Q. Was any one else injured in this accident? If so, who and to what extent.

A. Mrs. Hart and the nurse were slightly injured. [30]

Q. What happened immediately after the accident?

(Deposition of J. Ward.)

A. I have no recollection during my semi-conscious condition.

Q. Where was Mrs. Edith P. Chenery taken after the accident?

A. To Mr. Herbert Bull's house, close by.

Q. State if you know whether or not a doctor was called into attendance.

A. Yes, a doctor was called.

Q. If so, what was his name and address?

A. Dr. Walls, Clevedon.

Q. Who took charge of the body of Mrs. Edith P. Chenery after the accident?

A. Mrs. Humphrey Davies.

Cross-interrogatories.

Q. Was not your regular run between Clevedon and Papakura? A. Yes.

Q. Where was it that you first met Mrs. Chenery?

A. Whakatiri.

Q. Where was it that you first took her into your automobile for transportation to Papakura?

A. Whakatiri.

Q. Was the point where you first took Mrs. Chenery into your automobile for transportation to Papakura on your regular run from Clevedon to Papakura? A. No.

Q. How far was it from your regular run?

A. About six miles.

Q. In what direction is it from Clevedon to Papakura? A. West.

Q. In what direction from Clevedon is the place where you first met Mrs. Chenery and took her

(Deposition of J. Ward.)
into your automobile for transportation to Papakura? A. East.

Q. How far from Clevedon is the place where you first met Mrs. Chenery and took her into your automobile for transportation to Papakura?

A. About six miles.

Q. How far is it from Clevedon to Papakura?

A. About eight miles.

Q. How far is it from Clevedon to the point where you first met Mrs. Chenery and took her into your automobile? A. About six miles.

Q. Is it not a fact that you met Mrs. Chenery and took her into your automobile for transportation to Papakura on the Clevedon-Freshwater Road? [31]

A. No. A road we call the Maori Road, opposite direction from the Papakura Road.

Q. Did you have any regular run of automobiles on the Clevedon-Freshwater Road? A. No.

Q. Did you send automobiles to points on the Clevedon-Freshwater Road unless they were specially hired for such service? A. No.

Q. How did it happen that you were on the Clevedon-Freshwater Road the afternoon of the accident?

A. Do not know a road called the Freshwater. Was on the Maori Road to pick up Mrs. Chenery and party.

Q. Who asked you to transport Mrs. Chenery to Papakura? A. Mrs. Chenery by telephone.

Q. What payment was made for the service?

(Deposition of J. Ward.)

A. Payment has never been made.

Q. Who arranged for the payment?

A. Mrs. Chenery.

Q. Is it not a fact that Mrs. Chenery was one of a party of four that constituted her party and for whom transportation was desired from the Humphreys-Davies farm to Papakura? A. Yes.

Q. What was the time of your regular runs from Clevedon to Papakura?

A. Three trips daily leaving Clevedon at 7 A. M., 8:30 A. M. and 3:30 P. M.

Q. On the day of the accident had your automobiles left Clevedon for these regular runs?

A. Not that automobile.

Q. Did the accident occur on one of your regular runs from Clevedon to Papakura or some hours later? A. Some hours later.

Q. At what time did the last automobile leave on the regular run from Clevedon to Papakura?

A. 3:30 P. M.

Q. At what time did the automobile in which Mrs. Chenery was riding leave Clevedon for Papakura?

A. About half-past five in the afternoon. [32]

Q. What baggage was in the automobile belonging to Mrs. Chenery and the other members of her party?

A. Several bags and hampers. I do not remember the exact amount.

Q. Were there any other persons in the auto-

(Deposition of J. Ward.)

mobile besides Mrs. Chenery and the party that she was a member of and yourself? A. No.

Q. At the time of the accident in what different businesses did you engage?

A. No other business than motor proprietor.

Q. Is it not a fact that you had a general garage business at that time?

A. My partner had a garage business.

Q. Is it not a fact that you had several automobiles? A. Yes.

Q. Is it not a fact that you hired out automobiles and hired out privately various automobiles with drivers?

Mr. AMES.—I object to that question as immaterial, irrelevant and incompetent, and not connected up with this case, on this particular trip, in any way.

The COURT.—It might be, but this is cross-examination; objection overruled.

Mr. AMES.—Exception.

A. Never employed outside drivers. All driving done by either my partner or myself.

Q. Is it not a fact that you hired out automobiles privately in addition to the automobiles used on the regular run from Clevedon to Papakura?

Mr. AMES.—The same objection to all this line of testimony, your Honor.

The COURT.—It will be admitted over the objection.

Mr. AMES.—Exception.

A. Yes.

(Deposition of J. Ward.)

Q. Is it not a fact that in your business at the time of the accident a person could engage an automobile from you privately for transportation from Clevedon to Papakura? A. Yes. [33]

Q. Is it not a fact that you had at your garage automobiles that anyone could hire privately?

A. Yes.

Q. What was the regular fare on your regular run from Clevedon to Papakura?

A. Three shillings.

Q. What charge was made for transporting Mrs. Chenery from the Humphreys-Davies Farm to Papakura?

A. The amount usually charged was one pound, fifteen shillings.

Q. Is it not a fact that your last regular schedule run was to leave Clevedon at 3:30 in the afternoon? A. Yes.

Q. Is it not a fact that at 3:30 in the afternoon of the day of the accident one of your automobiles left on your regular run from Clevedon to Papakura?

Mr. AMES.—I object to that as calling for the conclusion of the witness and immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. AMES.—Exception.

A. Yes.

Q. Is it not a fact that the automobile leaving at 3:30 in the afternoon was the last regular run for that day from Clevedon to Papakura?

A. Yes.

(Deposition of J. Ward.)

Q. If the automobile involved in the accident had not been specially hired for the service would you have sent any automobile from Clevedon to Papakura after 3:30 in the afternoon of the day of the accident? A. No.

Q. Please state what was said to you when the arrangements were made for you to transport Mrs. Chenery and her party to Papakura?

A. Mrs. Chenery rang me on the phone and asked me if I would come and pick them up.

Q. By whom were these arrangements made?

A. Mrs. Chenery.

Q. Is it not a fact that the call came by telephone?

A. Yes.

Q. Who was it that called you by telephone?

A. Mrs. Chenery. [34]

Q. What did that person say to you?

A. She asked me to come and pick them up.

Q. What time did your regularly schedule automobiles leave Clevedon?

A. 7 A. M., 8:30 A. M., 3:30 P. M.

Q. Had all three of these regularly scheduled automobiles left on the day of the accident before Mrs. Chenery left Clevedon in your automobile?

A. Yes.

Q. Is it not a fact that at the time of the accident you were carrying on a general garage business?

Mr. AMES.—I object to the question as immaterial, irrelevant and incompetent as to what other business he may have had.

(Deposition of J. Ward.)

The COURT.—It is cross-examination; objection overruled.

Mr. AMES.—Exception.

A. My partner was.

Q. Is it not a fact that you were then doing general repair work of automobiles and selling parts and materials for automobiles?

A. My partner was.

Q. At the time of the accident how many men were employed by your firm?

A. One boy employed.

Q. Were you also at that time agent for certain automobiles?

Mr. AMES.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—It is cross-examination. Of course, if he was a common carrier, or was acting within the conditions of the policy, it would be immaterial, but this is cross-examination. Objection overruled.

Mr. AMES.—Exception.

A. My partner was.

Q. Is it not a fact that these did all the work of the garage, attended to the regular run from Clevedon to Papakura, and also looked out for private calls when automobiles were specially hired?

A. Yes. [35]

Q. Was it your practice at the time of the accident to hire out cars for private use with drivers?

Mr. AMES.—The same objection.

The COURT.—Objection overruled.

(Deposition of J. Ward.)

Mr. AMES.—Exception.

A. Yes.

Q. Was it part of your regular business?

A. Yes.

Q. Was it pursuant to that branch of your business that arrangements were made to take Mrs. Chenery and party from the Humphreys-Davies Farm to Papakura?

Mr. AMES.—I object to that as immaterial, irrelevant and incompetent. The foundation is that it was his partner's business.

Mr. ALEXANDER.—No, he didn't say that; he said that he took cars privately; he said it was part of his regular business.

Mr. AMES.—Also the further objection that even if that were so it would not make him out to be anything but a common carrier.

The COURT.—I suppose that is one of the issues in the case. I think he may answer the question. It will be controlled by instructions at the proper time.

Mr. AMES.—Exception.

A. Yes.

Q. Did you have any regular run to any place other than from Clevedon to Papakura? A. Yes.

Q. Did you know George Humphreys-Davies before the accident? A. Yes.

Q. Please state where he lives. A. Sandspit.

Q. Please state what, if anything, was said to you by Mrs. Chenery before the accident.

A. She asked what time the next train left Papa-

(Deposition of J. Ward.)

kura, and I told her twenty minutes to seven. She then said we would have plenty of time to drive slowly, as she was terribly nervous and that she was afraid to get in a motor car, boat or cart. [36]

Q. State what you observed of Mrs. Chenery's physical condition before the accident.

A. She seemed of a nervous disposition.

Q. State what you observed of Mrs. Chenery's mental condition before the happening of the accident. A. Nothing.

DEPOSITION OF GEORGE HUMPHREYS-DAVIES, FOR PLAINTIFF.

Thereupon counsel read the deposition of GEORGE HUMPHREYS-DAVIES, a witness duly sworn and called on behalf of plaintiff.

Direct Interrogatories.

Q. What is your name and address?

A. George Humphreys-Davies, Freshwater, Clevedon, New Zealand.

Q. What is your occupation?

A. Sheep-farmer.

Q. What relation were you, if any, to Edith P. Chenery? A. Brother-in-law.

Q. Did you know Edith P. Chenery in her lifetime? A. Yes.

Q. Was she a visitor at your house near Clevedon, New Zealand, just prior to the 16th day of June, 1923? A. Yes.

Q. On what day did she leave your house?

(Deposition of George Humphreys-Davies.)

A. June 16th, 1923.

Q. Was she on that day in sound condition mentally and physically so far as you observed.

A. She was.

Q. Were there any indications that she was not in sound condition mentally and physically?

A. None whatever.

Q. On that day where did she go?

A. Towards Auckland.

Q. Who went with her?

A. Miss Edge, Mrs. Hart, Mr. Spence.

Q. Upon what conveyance was Mrs. Chenery and those with her conveyed from your house?

A. A farm cart belonging to myself to meet Ward's taxi at E. Brown's, a distance of about three miles.

Q. Was Mrs. Chenery aboard this conveyance as a passenger for hire?

A. Not on the cart, but for hire on Ward's taxi.

Q. By whom was this conveyance operated?

A. The cart by a farm servant and the taxi by J. Ward.

Q. Where does J. Ward live?

A. In Clevedon.

Q. What was his business in the month of June, 1923? [37]

A. Motor proprietor, licensed by Papakura Town Board to carry passengers for payment.

Q. Between what points does J. Ward operate a motor-bus? A. Clevedon and Papakura.

Q. Have you ever ridden in the motor-bus opera-

(Deposition of George Humphreys-Davies.)

ted by J. Ward between Clevedon and Papakura? If so, approximately how many times?

A. Yes. Probably thirty-five to forty times.

Q. Describe in detail what kind of a vehicle it was.

A. Dodge, chassis specially lengthened to hold extra seat between ordinary front and back seats. Specially built for hire service.

Q. What is the charge made by J. Ward for carrying passengers between Clevedon and Papakura?

A. Three shillings and sixpence single fare and six shillings return. The fares fluctuate according to competition.

Q. State, if you know, whether or not J. Ward has a regular route between Clevedon and Papakura for the carrying of passengers. A. Yes, he has.

Q. Do you know whether or not J. Ward makes a business of carrying anything besides passengers on this route? If so, what does he carry?

A. Bread for the Papakura bakery every morning except Sundays, parcels and small baggage, independent of passengers.

Q. Does he make a practice of carrying bread, newspapers, baggage or other articles between these two points for hire? A. Yes.

Q. State whether or not this conveyance upon which Mrs. Chenery left your house on June 16, 1923, as a passenger for hire, was a public or private conveyance.

Mr. ALEXANDER.—We object to that on the following grounds: The witness was not there. It

(Deposition of George Humphreys-Davies.)

was three miles from his home. He could not have known what the facts were, because he was not there. It calls for the conclusion of the witness. It is leading. The transportation took place three miles from his home and he was not there. [38]

The COURT.—Objection sustained.

Mr. AMES.—Your Honor, he could testify as to what J. Ward had in the way of a motor-bus.

The COURT.—He has testified already as to his public character in so far as it is generally known. I think when you reduce him to the particulars of this occasion he could not have known the details. Objection sustained.

Mr. AMES.—Exception.

Q. Does J. Ward serve the public generally in the carrying of passengers, packages and other articles?

Mr. ALEXANDER.—I object to the question as calling for the legal conclusion of the witness, and as leading.

The COURT.—No, I think not. Objection overruled. He has already shown he served the public generally.

Mr. ALEXANDER.—Exception.

A. Yes.

Q. When did you next see Mrs. Edith P. Chenery after she left your house on the 16th of June, 1923?

A. About 9 P. M. on the 16th.

Q. Where did you next see her?

A. At Bull's Farm.

Q. On that occasion, was she alive or dead?

(Deposition of George Humphreys-Davies.)

A. Dead.

Cross-interrogatories.

Q. Where did you live on the 16th of June, 1923?

A. Freshwater, near Clevedon.

Q. Who was visiting at your house on that date?

A. Mrs. Chenery, Mrs Hart, Nurse Patton, Nurse Edge and Mr. Spence.

Q. Who was at your house besides Mrs. Chenery?

A. All the above and Mrs. Humphreys-Davies.

Q. Did you call up J. Ward and arrange for transporting these persons from your farm to Papakura? A. I did not.

Q. Is your farm on the road that runs from Clevedon to Papakura?

A. On a continuation of the road. [39]

Q. Is your farm on the run that was made regu larly by Ward from Clevedon to Papakura?

A. No.

Q. In what direction is Papakura from Clevedon?

A. On the remote side from my farm.

Q. In what direction is your farm from Clevedon?

A. On the side remote from Papakura.

Q. Is there any regular run from your farm or near it to Papakura?

A. From Clevedon.

Q. How far is your farm from Clevedon?

A. About nine miles.

Q. Is it not a fact that your farm is on an entirely different road than the road which runs from Clevedon to Papakura?

A. On the same road but a continuation.

(Deposition of George Humphreys-Davies.)

Q. At what point was it that Mrs. Chenery first met J. Ward and began the ride in his automobile?

A. E. Brown's house.

Q. How far is that point from the beginning of his regular run from Clevedon to Papakura?

A. Six miles.

Q. What was the manner of transportation of Mrs. Chenery to your farm?

A. By rail to Papakura. Ward's taxi to Brown's and Brown's farm cart to Freshwater.

Q. Why did she not go back by water?

A. Because my launch was not available.

Q. State her mental condition in regard to the return trip? A. Exceedingly cheerful.

Q. How many persons were in Mrs. Chenery's party? A. Three besides herself.

Q. Is it not a fact that Miss Edge was there and Mrs. Hart and Mr. Spence and also Mrs. Chenery?

A. Yes.

Q. How much baggage did each of them take with them in the automobile on the trip to Papakura?

A. Hand baggage only.

Q. Was there a nurse in the automobile before the accident? A. Yes.

Q. Who was that nurse? A. Miss Edge. [40]

Mr. AMES.—Now, I renew my request to have the answer to question 23 allowed, on the ground that Mr. Alexander's objection that no proper foundation has been laid has been obviated by the cross-examination.

(Deposition of Ethel Humphreys-Davies.)

The COURT.—What is there in the cross-examination?

Mr. AMES.—He asked several questions about how she went.

The COURT.—Any objection?

Mr. ALEXANDER.—Yes, your Honor. I simply fixed the places of these different points.

The COURT.—Motion denied.

Mr. AMES.—Exception.

DEPOSITION OF ETHEL HUMPHREYS-DAVIES, FOR PLAINTIFF.

Thereupon counsel read the deposition of ETHEL HUMPHREYS-DAVIES, a witness duly sworn and called on behalf of plaintiff.

Q. What is your name and address?

A. Ethel Dorothy Humphreys-Davies.

Q. What is your occupation? A. Housewife.

Q. What relation were you, if any, to Edith P. Chenery? A. Sister.

Q. Did you know Edith P. Chenery in her lifetime? A. Yes.

Q. What was her age on June 16, 1923, the date of her death? A. About fifty-four.

Q. Was she a visitor at your house near Clevedon, New Zealand, just prior to the 16th day of June, 1923? A. Yes.

Q. On what day did she leave your house?

A. June 16th, 1923.

Q. Was she on that day in sound condition mentally and physically so far as you observed?

(Deposition of Ethel Humphreys-Davies.)

A. Yes.

Q. Were there any indications that she was not in sound condition mentally and physically?

A. No.

Q. On that day where did she go?

A. To Clevedon, enroute to Auckland.

Q. Who went with her?

A. Mrs. Hart, Mr. Spence and Miss Edge. [41]

Q. Upon what conveyance was Mrs. Chenery and those with her conveyed from your house?

A. In a farm cart driven by a Maori as far as the unmetallized road. Then met by a Ford driven by Mr. J. Ward.

Q. Was Mrs. Chenery aboard this conveyance as a passenger for hire?

A. Not upon the cart but the car.

Q. By whom was this conveyance operated?

A. The car, J. Ward.

Q. Where does J. Ward live? A. Clevedon.

Q. What was his business in the month of June, 1923?

A. Garage and taxi and motor-bus service.

Q. Between what points does J. Ward operate a motor-bus? A. Clevedon and Papakura.

Q. Have you ever ridden in the motor-bus operated by J. Ward between Clevedon and Papakura? If so, approximately how many times?

A. Yes. Over twenty times.

Q. Describe in detail what kind of a vehicle it was.

A. Dodge with specially lengthened chassis.

Q. What is the charge made by J. Ward for

(Deposition of Ethel Humphreys-Davies.)

carrying passengers between Clevedon and Papakura?

A. Three shillings and six pence single fare and six shillings return.

Q. State if you know whether or not J. Ward has a regular route between Clevedon and Papakura for the carrying of passengers. A. Yes.

Q. Do you know whether or not J. Ward makes a business of carrying anything besides passengers on this route? If so, what does he carry?

A. Small parcels, papers, bread, small baggage.

Q. Does he make a practice of carrying bread, newspapers, baggage or other articles between these two points for hire? A. Yes.

Q. State whether or not this conveyance upon which Mrs. Chenery left your house on June 16, 1923, as a passenger for hire, was a public or private conveyance. [42]

Mr. ALEXANDER.—Objected to as calling for the legal conclusion of the witness, as leading, and it does not appear that she knows.

The COURT.—Objection sustained.

Mr. AMES.—Exception.

Q. Does J. Ward serve the public generally in the carrying of passengers, packages and other articles?

Mr. ALEXANDER.—Objected to as leading and calling for the legal conclusion of the witness.

The COURT.—Objection overruled.

Mr. ALEXANDER.—Exception.

A. Yes.

(Deposition of Ethel Humphreys-Davies.)

Q. When did you next see Mrs. Edith P. Chenery after she left your house on the 16th of June, 1923?

A. At Mrs. Bull's about 10 P. M. June 16th, 1923.

Q. Where did you next see her?

A. At the undertakers.

Q. On that occasion, was she alive or dead?

A. Dead.

Q. Please give the name and address of the physician who attended Mrs. Chenery after the accident.

A. Dr. Walls of Clevedon and Dr. Page of Papakura.

Cross-interrogatories.

Q. Where did you live on the 16th of June, 1923?

A. Freshwater, near Clevedon, New Zealand.

Q. Who was visiting at your house on that date?

A. Mrs. Chenery, Mrs. Hart, and Mr. Spence and Miss Patton.

Q. Who was at your house besides Mrs. Chenery?

A. Mrs. Hart, Mr. Spence, Miss Edge, Miss Patton and my husband Captain Humphreys-Davies.

Q. Did you call up J. Ward and arrange for transporting these persons from your farm to Papakura? A. Yes.

Q. Is your farm on the road that runs from Clevedon to Papakura? A. No. [43]

Q. Is your farm on the run that was made regularly by Ward from Clevedon to Papakura?

A. No.

Q. In what direction is Papakura from Clevedon?

A. On the remote side from Auckland.

(Deposition of Ethel Humphreys-Davies.)

Q. In what direction is your farm from Clevedon?

A. On the remote side from Clevedon.

Q. Is there any regular run from your farm or near it to Papakura?

A. Not nearer than Clevedon.

Q. How far is your farm from Clevedon?

A. Nine miles.

Q. Is it not a fact that your farm is on an entirely different road than the road which runs from Clevedon to Papakura? A. Yes.

Q. At what point was it that Mrs. Chenery first met J. Ward and began the ride in his automobile?

A. In front of E. Brown's house about three miles from my house.

Q. How far is that point from the beginning of his regular run from Clevedon to Papakura?

A. Six miles—about.

Q. What was the manner of transportation of Mrs. Chenery to your farm?

A. Train to Papakura, Ward's car to Mr. Brown's house Mr. Brown's cart to the farm.

Q. State her mental condition in regard to the return trip? A. Very cheerful.

Q. How many persons were in Mrs. Chenery's party? A. Four.

Q. Is it not a fact that Miss Edge was there and Mrs. Hart and Mr. Spence and also Mrs. Chenery?

A. Yes.

Q. How much baggage did each of them take with them in the automobile on the trip to Papakura?

A. Hand baggage only.

(Deposition of Ethel Humphreys-Davies.)

Q. Was there a nurse in the automobile before the accident? A. Yes.

Q. Who was that nurse? A. Miss Doria Edge.

Mr. AMES.—Now, I would like to renew my offer of question No. 24 on direct examination of Mrs. Humphreys-Davies on the ground that the foundation was laid in question 12 of the cross-interrogatories. [44]

Mr. ALEXANDER.—It is exactly the same situation, your Honor.

The COURT.—Motion denied; objection sustained.

Mr. AMES.—Exception.

Mr. AMES.—That is our case.

The COURT.—Proceed for the defense.

Mr. ALEXANDER.—We rest. We move the Court for a directed verdict. I wish to present the motion, with the authorities in support of it, and ask if your Honor wishes to keep the jury here during the argument.

The COURT.—I doubt if there is very much in this case but a law question. You may proceed.

Mr. ALEXANDER.—If your Honor please, at this time, on behalf of the defendant we move for a directed verdict in its favor upon the ground that the allegations of the complaint have not been sustained, and upon the further ground that it appears from the testimony taken that the plaintiff is not entitled to a recovery in this action.

The COURT.—At the conclusion of the evidence in this case the defense moved that the jury be di-

rected to return a verdict in its favor on the ground that the evidence had failed to make out a case which would support any verdict for the plaintiff.

The action is upon an insurance policy, which has a not unusual provision, namely, that while it insures the life of the husband for the benefit of the wife, it contains a provision insuring the wife to a certain extent, namely, while a passenger in or on a public conveyance, including platform, steps, or running-board—words indicating somewhat the character of a public conveyance, provided by a common carrier for passenger service; that is to say, if the wife is injured or killed while a passenger in or on a public conveyance provided by a common carrier for passenger [45] service, the insurance company will pay a certain amount, depending upon the extent of the injuries. The beneficiary, the wife in this case, was killed, according to the evidence, under circumstances that have been detailed, namely, while riding in an automobile from near the farm where she was a visitor, through one town, Clevedon, to another town on the railroad. The contention of the plaintiff is that she was thus injured while a passenger on a public conveyance provided by a common carrier for passengers. The case has been argued, the evidence is without conflict, there can be only one question involved in it, and that is whether or not the conveyance was a public conveyance provided by a common carrier at that particular time and place where the wife was injured. Both parties have argued this matter and submitted a good deal of

law, but there are a few considerations the Court deems controlling, and will state them briefly.

In the first place, while it is true that insurance policies, where they are ambiguous, are to be construed as favorably in behalf of the insured and the beneficiary as they will bear, the Court finds nothing whatever ambiguous in this particular policy. A public conveyance provided for passengers by a common carrier has a well-defined and settled meaning, namely, a conveyance provided by one who is a common carrier for the indiscriminate use of the public, not necessarily between fixed points, or at a settled price, but one which he is under obligation as a common carrier to render service with when called upon by any of the patronizing public. The reasons for this limitation in the policy—for injuries received by the beneficiary while in a public conveyance provided by a common carrier of passengers, is very plain, namely, a public conveyance; and a common carrier is required to exercise a very much higher degree of diligence for the safety of the passenger than a private conveyance will exercise as required by law, and, therefore, the insurer—the company—in order to secure [46] to itself as much protection as possible in this collateral insurance of the wife, limits the circumstances under which it will pay to the one where she is injured in one of these conveyances operated by a common carrier, and those under and subject to a very high degree of care and diligence on the part of those who convey; it was not willing to accept the responsibility of a mere private carrier,

and in a private conveyance, frôm whom is not exacted that same degree of care and diligence. So much for that.

Now, the distinction between a private carrier and a common carrier is well settled. In some instances either may deviate from their settled character and perform the functions of another. A private carrier is one who usually will carry on special contracts, when he sees proper; does not hold himself out to be patronized by the public generally, and who is not bound to accept any passenger or engage in any contract of carriage unless he sees fit. A common carrier, however, is one whose labors are exclusively devoted to carrying the public on their demand. He is under a burden and a duty to carry anybody who will come along and patronize him at the times fixed, of course subject to time tables, and subject to his rates, and at a price fixed, may also on occasion be immaterial. He is not necessarily limited to a definite rate or to a fixed termination, but he is bound to give service to the public. It is not left to his whim to select his customers. The law in respect to taxicabs, automobiles and carriers of that character is not altogether clear, and not altogether settled, for the reason that the same carrier may serve partially as a private carrier and partially as a common carrier. For instance, in the case of a taxicab company, which is licensed by the city, which has an engagement with a railroad terminal, we will say, that is a case that the Supreme Court has passed on, to carry passengers from railroad

depots to hotels, or any other place in the city, and generally at rates fixed or subject to be fixed by the governing authority of the city: In that case [47] the taxicab man is a common carrier; he is bound to take any passenger at the depot who behaves himself and is a fit subject for carriage, and who will pay the fare. If the fares fixed by the city do not cover all points in the city, or all distances, there would be special contracts on occasion. But this same taxicab man, aside from the times when he is receiving passengers from depots and carrying them about the city, may operate as a private carrier. He may engage himself to anyone who wants to hire him on a special contract, for a special trip, at a special price, for a special number of passengers. To that extent he is a private carrier. He does not find himself under the obligation again to exercise the same high degree of care and diligence for the safety of the passenger that the common carrier does. His liabilities and his rights depend entirely upon the separate contract he makes with the individual.

The Supreme Court of the United States has dealt with the proposition now before the Court in Terminal Association vs. Kutz, 241 U. S., where they drew that distinction and pointed it out, that the taxicab man—owner—proprietor—in so far as he was subject to contract to wait at hotels and carry passengers from and to hotels, or to wait at the railroad terminal and carry from or to the railroad, was a common carrier. But wherein he received calls at his own garage, over the phone or

otherwise, for special engagements, and special trips, at contract rates to be fixed by himself, he was performing a duty simply within the bounds of private contract, and was not a common carrier.

Of course, that question involved the question as to how far the city could control and govern his actions as a public utility; but the fact that he was held not to be within the law as to a public utility in respect to his private engagements, was dependent entirely upon the fact that to that extent he was not by the Court held to be a common carrier. [48]

Now, we cannot go any further for authority than the Supreme Court of the United States. This Court is subject to it. Its decisions are subject to review, in the last analysis, by that court, and it is our duty to follow that court.

Now, fitting the law to the circumstances of this case, here is a man, Ward, whom the evidence shows was a common carrier between the town of Clevedon and the railroad terminal; he was licensed by the town to carry passengers between those two places; he had a time-table; he performed three round trips a day. There was nothing to indicate that he was obliged to perform any other trips. Just exactly the same as a railroad which has its time-table, those who want to travel must conform to the railroad's time, if they want to take advantage of its powers as a common carrier. The Court would not say that a railroad running a special train on a special occasion would not be a common carrier, but, again, that is different from this case. Ward was not obliged to go beyond the town of

Clevedon to pick up passengers. Those who wanted to patronize him would come there. He would pick up any on the road between Clevedon and Papakura, but he was not obliged to and could go elsewhere. There is evidence that on one occasion, or two, perhaps, he had visited this ranch. But whether or not under the same circumstances as the case and the occasion involved in this case, does not appear. On this particular day he received a call from one of the ladies at the ranch. This ranch was six miles beyond the town of Clevedon, which was the end of his regular run. He received a call out of his regular hours. He was asked if he would come and take a party to the railroad, and he answered that he would, and he did go. He made a special trip, for a special party, at a special time, off of his regular run, and for special compensation; whereas his regular price was 3 shillings for this trip for four passengers, he was to get something like 35 shillings—a very handsome and substantial increase. It is true [49] that where the accident occurred, and after he had received his party and was driving from Clevedon to Papakura, he was then on his regular run, but still it was a single, indivisible and entire trip—a single, individual and entire contract and engagement, made not for his regular run, but to go far beyond it and take a special party on a special occasion and at a special price.

The Court cannot see that this case does not come clearly within the rule laid down by the Supreme Court in the Terminal Case, 241 U. S. In other

words, at this time and place where this unfortunate lady met her death, she was not riding in a public conveyance provided by a common carrier of passengers. He had laid aside, for the time being, his character as a common carrier. The conveyance at the time bore, not the character of a public conveyance, but to all intents and purposes was private for this particular party. Ward was a private carrier. The principles involved in the case are adverted to in the case of Santa Fe Railway Co., 228 U. S., where the Court points out that even a common carrier may occasionally lay aside his capacity of common carrier, enter the domain of a private carrier, and be held only to his contractual obligations.

For these reasons, holding, as I do, that the policy, when it said "common carrier in a public conveyance," meant what it said, to give to the insurance company the benefit of the high degree of diligence exacted of a common carrier, the Court is bound to and does hold that this case is not within the policy.

The motion for a directed verdict is granted.

Gentlemen of the Jury, there is nothing for you to decide in the case. It is simply a question of law. The juror in the end seat will sign the verdict.

Mr. AMES.—I desire to take an exception to the ruling of the court.

The COURT.—It will be noted. The case presents a very [50] small record, and it is one that

is very well worth while taking up and having the Court of Appeals pass upon it.

Mr. AMES.—Yes, your Honor, we intend to do that. We take an exception to the verdict and ask that the jury be polled.

The COURT.—No polling is necessary. They render a verdict in accordance with the ruling of the court. The jury could not dissent. [51]

EXHIBIT I.

In the Superior Court of the State of California in and for the City and County of San Francisco.

LETTERS OF ADMINISTRATION, WITH THE WILL ANNEXED.

Department No. 10, Probate.

No. 36,865 New Series.

State of California,
City and County of San Francisco,—ss.

The last Will of Edith P. Chenery, deceased, a copy of which is hereto annexed, having been proved and recorded in the Superior Court of the City and County of San Francisco and Leonard Chenery, is hereby appointed Administrator with the Will Annexed.

WITNESS, H. I. MULCREVY, Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, with the seal of said court affixed this 12th day of July, A. D. 1923.

By order of the Court:

[Seal] H. I. MULCREVY,
Clerk.
By A. R. Phillips,
Deputy Clerk.

State of California,
City and County of San Francisco,—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of Administrator with the Will Annexed of the Estate of Edith P. Chenery, Deceased, according to law.

LEONARD CHENERY.

Subscribed and sworn to before me this 12th day of July, 1923.

A. R. PHILLIPS,
Deputy County Clerk. [52]

Office of the County Clerk,
City and County of San Francisco,—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and *ex-officio* Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true and correct copy of the Letters of Administration with the Will Annexed in the Matter of the Estate of Edith P. Chenery, Deceased, now on file and of record in my office, and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

WITNESS my hand and the seal of said Court this 3d day of August, A. D. 1923.

[Seal] H. I. MULCREVY,
Clerk.
By S. I. Hughes,
Deputy Clerk.

[Endorsed]: Recorded M. B. —— Page ——. No. 36,865. Dept. 10. Probate. In the Superior Court of the State of California, in and for the City and County of San Francisco. In the Matter of the Estate of Edith P. Chenery, Deceased. Certified Copy of Letters of Administration With the Will Annexed.

[Endorsed]: Duplicate. Filed July 12, 1923. H. I. Mulcrevy, Clerk. By A. R. Phillips, Deputy Clerk.

EXHIBIT II.

This Policy Provides Indemnity for Loss of Life, Limb, Sight or Time by Accidental Means to the Extent Herein Provided.

Maximum Combination
Accident Policy No. 389,194
Form M. R.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND,

IN CONSIDERATION OF Twenty-five and 00/100 Dollars premium, and of the warranties in the "Schedule of Warranties" hereinafter contained, does hereby insure the person named therein

as the Assured against Bodily Injuries sustained during the term of this Policy, solely and independently of all other causes through external violent and accidental means (suicide whether sane or insane is not covered), as specified in the following schedule, subject to the Conditions hereinafter set forth:

SCHEDULE OF INDEMNITIES.

The Principal Sum of this Policy is Seventy-five Hundred and 00/100 Dollars ($7,500.00).

SECTION A.

SINGLE INDEMNITY—DEATH, DISMEMBERMENT AND LOSS OF SIGHT.

If such injuries shall wholly and continuously disable the Assured from the date of accident from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability, but within Two Hundred Weeks from date of accident, shall result independently and exclusively of all other causes in any one of the losses enumerated in this Section, or within ninety days from the date of the accident, irrespective of total disability, result in like manner in any one of such losses, the Corporation will pay the sum set opposite such loss and in addition weekly indemnity as provided in Section B to the date of death, dismemberment, or loss of sight; but only one of the amounts so specified and the additional weekly indemnity will be paid for injuries resulting from one accident. [53]

FOR LOSS OF

i	The Principal Sum
And in addition cost of transportation of the remains from the place (city or town) where death occurred to place (city or town) of burial, but not to exceed one-twentieth of Principal Sum.	
h Hands by Severance at or Above the Wrists............	The Principal Sum
h Feet by Severance at or Above the Ankles.............	The Principal Sum
Hand at or Above the Wrist and One Foot at or Above the Ankle by Severance..............................	The Principal Sum
ire Sight of Both Eyes if Irrecoverably Lost.............	The Principal Sum
ire Sight of One Eye if Irrecoverably Lost and One Hand at or Above the Wrist by Severance...................	The Principal Sum
re Sight of One Eye if Irrecoverably Lost and One Foot at or Above the Ankle by Severance...................	The Principal Sum
er Hand by Severance at or Above the Wrist............	One-half of Principal Sum
er Foot by Severance at or Above the Ankle............	One-half of Principal Sum
re Sight of One Eye if Irrecoverably Lost..............	One-half of Principal Sum

The payment in any such case shall end this Policy, but the same shall not affect any claim under Section H (Beneficiary Benefits) in respect of injuries sustained prior to such payment.

SECTION B.

SINGLE WEEKLY INDEMNITY — TOTAL AND PARTIAL DISABILITY.

If such injuries shall not result in any of the losses mentioned in Section A, but shall immediately, continuously and wholly disable and prevent the Assured from performing any and every kind of duty pertaining to his occupation, the Corporation will pay him so long as he lives and suffers such total disability, a WEEKLY INDEMNITY of TWENTY-FIVE DOLLARS ($25.00)

Or, if such injuries shall not wholly disable the Assured, as [54] above, but shall immediately, or

immediately following total disability, and continuously disable and prevent him from performing one or more important daily duties pertaining to his occupation, the Corporation will pay for the period of such partial disability, not exceeding 30 consecutive weeks, a Weekly Indemnity of One-Half the sum stipulated in this Section for total disability.

No payment of weekly indemnity shall be made in the case of any disability specified in Section A, except as therein provided.

SECTION C.

ELECTIVE BENEFITS.

If the Assured shall sustain an injury as hereinbefore defined, and which is named in the "Schedule of Injuries" hereinafter contained, he may elect to receive the amount of indemnity set opposite to said injury in said Schedule in lieu of all other indemnity, except for Surgical Operations or Hospital Expenses to which Assured may be entitled, provided written notice of his election is given to the Corporation within twenty days from the date said injury is received, but not more than one of said amounts shall be payable for injuries sustained in any one accident.

SECTION D.

DOUBLE INDEMNITIES.

If the Assured shall sustain such injuries while a passenger in or on a public conveyance (including the platform, steps or running-board thereof) provided by a common carrier for passenger ser-

vice (including Pullman cars); or while riding in a passenger elevator or escalator; or in consequence of the burning of a building while the Assured is therein, or caused by the collapse of the outer walls of a building while the Assured is therein, or caused by a stroke of lightning, or caused by the explosion of a steam boiler, or caused by a cyclone or tornado; then the Corporation will pay double the amount otherwise payable under the preceding Sections. [55]

SECTION E.

INDEMNITY FOR MEDICAL OR SURGICAL TREATMENT OF MINOR INJURIES.

If such injuries shall not result in disability, but shall require medical or surgical attention, the Corporation will reimburse the Assured for the cost thereof to an amount not exceeding One Week's Single Indemnity as provided under Section B, provided the physician's or surgeon's bill is furnished the Corporation within thirty days from the date of the accident.

SECTION F.

SUNSTROKE, FREEZING, HYDROPHOBIA OR ASPHYXIATION.

Any one of the following, namely,—sunstroke, freezing, hydrophobia or asphyxiation suffered through accidental means (suicide whether sane or insane is not covered) shall be deemed bodily injuries within the meaning of this Policy.

SECTION G.

BLOOD-POISONING.

Blood-poisoning resulting directly from bodily injuries shall be deemed to be included in the said term, bodily injuries.

SECTION H.

BENEFICIARY BENEFITS.

If one person only is specifically named as the Beneficiary in the "Schedule of Warranties" hereinafter contained and such person is not under 18 or over 60 years of age, and is in sound condition mentally and physically; then and not otherwise, this Policy shall also insure such Beneficiary against bodily injuries sustained during the term of this Policy, solely and independently of all other causes through external, violent and accidental means (suicide whether sane or insane is not covered), and received: while a passenger in or on a public conveyance (including the platform, steps or running-board thereof) provided by a common carrier for passenger service (including Pullman cars); or while riding in a passenger elevator or escalator; or in consequence of the burning of a building while the Beneficiary is therein, as follows: [56]

FOR LOSS OF

fe	Two-thirds of Principal Sum
th Hands by Severance at or Above the Wrists	Two-thirds of Principal Sum
th Feet by Severance at or Above the Ankles	Two-thirds of Principal Sum
e Hand at or Above the Wrist and One Foot at or Above the Ankle by Severance	Two-thirds of Principal Sum
tire Sight of Both Eyes if Irrecoverably Lost	Two-thirds of Principal Sum
tire Sight of One Eye if Irrecoverably Lost and One Hand at or Above Wrist by Severance	Two-thirds of Principal Sum
tire Sight of One Eye if Irrecoverably Lost and One Foot at or Above Ankle by Severance	Two-thirds of Principal Sum
ther Hand by Severance at or Above the Wrist	One-third of Principal Sum
ther Foot by Severance at or Above the Ankle	One-third of Principal Sum
tire Sight of One Eye if Irrecoverably Lost	One-third of Principal Sum

(One Loss Only is Payable for One Accident.)

If the Beneficiary shall sustain an injury in the manner defined in this Section and such injury shall within ninety days from the date of accident necessitate an operation as named in the "Schedule of Operations" hereinafter contained, and the same shall be performed, the Corporation will pay One-Half of the sum specified in said Schedule for such operation; but no payment shall be made for more than one operation necessitated by injuries sustained in any one accident.

The amount payable in the event of the loss of life of the Beneficiary shall be paid to the Legal Representatives of the Beneficiary; the payment of any other sum provided for in this Section shall be made to the person insured as Beneficiary. [57]

SECTION I.

SURGICAL OPERATIONS.

If by reason of such injuries any of the operations named in the "Schedule of Operations" shall be performed upon the Assured by a surgeon within

ninety days from the date of the accident, the Corporation will pay to the Assured, in addition to the indemnity herein provided, the sum specified for such operation in said Schedule, but payment shall not be made for more than one operation necessitated by injuries sustained in one accident.

SECTION J.

HOSPITAL EXPENSES.

If a bodily injury for which indemnity is payable under this policy, is suffered by the Assured, and if on account of said bodily injury and within ninety days from the date of the accident, the Assured is removed to a regular hospital, provided that no claim is made under Section I, the Corporation will pay the Assured (in addition to the idemnity payable for said injury) for the period, not exceeding ten weeks, during which the Assured is necessarily confined in the said hospital, the amount expended by him on account of the hospital charges, but not exceeding per week One-Half the weekly indemnity specified in Section B.

SECTION K.

IDENTIFICATION.

If the Assured by reason of injury or illness shall be physically unable to communicate with friends, the Corporation, upon receipt of a telegram or other message giving the number of this Policy, will immediately transmit to his relatives or friends any information respecting him, and will defray all expenses not exceeding one hundred dollars, necessary to put the Assured in the care of friends. [58]

CONDITIONS.

1. If the Assured is injured, fatally or otherwise, after having changed his occupation to one classified by this Corporation as more hazardous than that herein stated (except ordinary duties about his residence, or while engaged in recreation), the Corporation's liability shall be only for such proportion of the benefits named in this Policy as the premium paid by him would have purchased at the rate and within the limits fixed by the corporation, for such more hazardous occupation according to its rates and classification of risks filed prior to the occurrence of the injury for which indemnity is claimed, with the State official having supervision of insurance companies in the State where the Assured resides at the time this Policy was issued.

2. Indemnity for loss of life of the Assured shall be paid to the Beneficiary named in the "Schedule of Warranties," if surviving, otherwise to the Legal Representatives of the Assured.

3. This insurance shall not cover injuries fatal or nonfatal, sustained while participating in or in consequence of having participated in aeronautics, or injuries fatal or non-fatal, resulting directly or indirectly, wholly or partly, out of the operations of war.

4. This Policy shall be void if any like Policy on the Assured has been issued by this Corporation and is in force at the date hereof, unless this Policy contains an endorsement signed by the Corporation's Manager for the United States that such prior policy may be continued in force. The Corporation shall

not be presumed or held to know of the existence of any previous Policy, and in such case the issue of this Policy shall not be deemed a waiver of this Condition. [59]

5. No claims shall be valid on account of any injuries, fatal or otherwise, unless written notice is given to the Corporation's Manager for the United States at Boston, Massachusetts, or to the Agent of the Corporation whose name is endorsed hereon, within thirty days from the date of sustaining any injuries, fatal or otherwise (unless such notice may be shown not to have been reasonably possible), for which claim is to be made, with full particulars thereof and full name and address of the Assured or Beneficiary, as the case may be. Affirmative proof of death, or loss of limb, or sight, or of the duration of disability must be furnished to the Corporation within ninety days from the time of death, or loss of limb, or sight, or of the termination of disability.

6. Legal proceedings for recovery hereunder may not be brought before the expiration of sixty days from the date of filing final proofs with the Corporation, nor brought at all unless begun within two years from the time required herein for final proofs.

7. Claims for indemnity for disability of less than thirteen weeks' duration shall be payable at the end of the period of disability; claims in excess shall be payable at the end of each thirteen weeks of continuous disability, satisfactory affirmative proof of disability and of its continuance to be furnished

before each payment, and final proof in all cases to be furnished in accordance with Condition 5.

8. Notice of a claim for indemnity shall be deemed sufficient when given to the Corporation's Manager for the United States at Boston, Massachusetts, or to a duly authorized Agent of the Corporation in the city, town or county in which the Assured shall reside at the time of giving such notice.

9. The Corporation shall have the right and opportunity to examine the person of the assured or beneficiary, in respect to [60] any alleged injury, disability, or cause of death as often and in such manner as it requires, and shall also have the right and opportunity to make an autopsy in case of death where such autopsy is not forbidden by statute.

10. Any claims arising hereunder, on account of the death of Assured shall be subject to proof of interest. Copy of any assignment shall be given within thirty days to the Corporation, which shall not be responsible for its validity. Consent of the Beneficiary shall not be requisite to a surrender or an assignment of this Policy, or to a change of Beneficiary, or to any change in the policy.

11. This Policy, with a copy of the application therefor, and any riders or endorsements endorsed hereon or attached hereto constitute the entire contract of insurance, except as the same may be affected by any table of rates or classification of risks filed by the Corporation with the Insurance Department of the State wherein this policy is issued, and effective at the time of such issue or delivery.

12. No statement made by the Applicant for this insurance, which statement is not incorporated in or endorsed on the Policy, shall void this Policy, or be used in evidence, and no provision of the charter, constitution or by-laws of this Corporation shall be used in defense of any claims arising under this Policy unless such provisions are incorporated in full in the Policy, but this requirement shall not be deemed to apply to the table of rates or manual of classification of risks filed by the Corporation with the Insurance Department of the State in which the Policy is issued.

13. The Corporation may cancel this Policy at any time by written notice delivered to the Assured or mailed to him at his last address appearing on the Corporation's records with its check for the unearned part, if any, of the premium, but such cancellation [61] shall be without prejudice to any claim arising on account of disability commencing prior to the date on which the cancellation takes effect.

14. No Agent has the power to waive or alter any of the conditions of this Policy.

15. The Assured on the acceptance of this Policy makes the following statements, which he warrants to be true, and such statements are hereby made part of this contract:

SCHEDULE OF WARRANTIES.

1. (Assured.) My full name is Leonard Edwin Chenery.
2. My age is 47. My height is 5 feet 8 inches. My weight is 143 pounds. Race—White.

3. My residence is 2205 California Street, City or Town of San Francisco, County of San Francisco, State of California.
4. Beneficiary:

   Name in Full—Edith Chenery.

   Relationship—wife. Address—same.

   (member of firm)
5. I am (employed by) Henry F. Allen of 210 California Street, City or Town of San Francisco, State of California, whose business is commission merchants, grain and beans.
6. My occupation and duties are fully described as follows:

   Manager; office duties. Classified as select.
7. My income per week exceeds the amount of single weekly indemnity under this and all other policies carried by me.
8. I have no other accident insurance in any company or association, except as follows:—no exceptions (The name of company or association and amount in each to be stated above.)
9. No application ever made by me for accident or health insurance has been declined and no accident or health policy issued to me has been cancelled or renewal refused, except as herein stated: No exceptions. [62]
10. I have never received indemnity for any accident or illness, except as herein stated: Claim $25. July 1913.

11. I have not in contemplation any special journey or hazardous undertaking, except as herein stated. No exceptions.
12. I have never had nor am I subject to fits or paralysis, disorders of the brain, or any bodily or mental infirmity except as herein stated. No exceptions.
13. My habits of life are correct and temperate and I am in sound condition mentally and physically, except as herein stated. No exceptions.
14. The term of this Policy is Twelve months, beginning at twelve o'clock noon, standard time, on the 5th day of July, 1917, and ending on the 5th day of July, 1918.

IN WITNESS WHEREOF, the Corporation has caused this Policy to be executed by its authorized Manager acting under power of attorney, but it shall not be in force until countersigned by a duly authorized Agent of the Corporation.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON.

By SAMUEL APPLETON,

Manager and Attorney for the United States.

CHARLES J. OKELL & CO.

Countersigned—C. V. JENSEN,

Agent.

At San Franciscoo, Calif. Date: June 14th, 1917.

[63]

CHANGE OF BENEFICIARY FORM.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

(United States Branch: Chief Office, Boston, Mass.)

This instrument must be executed in duplicate, and both parts sent to the Corporation for endorsement of consent to change. After endorsement is made, one part will be returned to the Assured to be attached to the Policy. But the Corporation assumes no responsibility, in consenting to the change of beneficiary, for the validity of this instrument.

Revoking hereby any previous designation which may be inconsistent herewith, I hereby direct that the insurance under Policy No. MR. 389194 issued by THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND, to me be paid, in the event of my death (subject to the provisions of said Policy and in accordance with the terms thereof), to Marion S. Chenery of San Francisco, California, whose relationship to me is that of sister.

Provided, however, that if the death of said nominee shall occur prior to mine, the sum which such deceased would otherwise have taken shall go to my legal representatives.

And the right is reserved to revoke this designation, and, subject to the consent of the Corporation, to nominate a new beneficiary.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 6th day of July, 1923, at San Francisco, in the State of California.

(Signed) LEONARD CHENERY,
Assured.

In presence of MARY GRANUCCI,
Of San Francisco, California.
J. D. CHALMEY,
Of San Francisco, California. [64]

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND, hereby consents to the change of beneficiary herein set forth.

SAMUEL APPLETON,
Manager and Attorney for the United States.
CHARLES J. OKELL & CO.
Countersigned by C. V. JENSEN, Agent.
July 6, 1923.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

ENDORSEMENT BLANK.

Dated at San Francisco, Cal.,
This 6th day of July, 1923.

Attached to and forming part of Policy No. MR–389194–RR. 295441 issued to Leonard Edwin Chenery.

It is understood and agreed that the business address of the assured as described under Item 5

is changed to read: #245 California Street, San Francisco, California.

CHARLES J. OKELL & CO.,
By W. A. MORRISON,
General Agents.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

(Rider for Accident Policies—Change of Residence.)

Attached to and forming part of Policy No. 389194 issued to Leonard Edwin Chenery.

Notice is hereby accepted that the residence of the Insured under this policy is changed to Apartment #1, 1869 California Street, City or Town of San Francisco, County of San Francisco.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON.
SAMUEL APPLETON,
Manager and Attorney for the United States.
CHARLES J. OKELL & CO., General Agent.
August 19th, 1918. [65]

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

(Insuring Clause Waiver.)

July 5th, 1917.

Attached to and Forming Part of Policy No. 389194, Issued to Leonard Edwin Chenery.

It is understood and agreed that the words "Ex-

ternal, violent and" appearing in the Insuring Clause of this Policy are hereby eliminated.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

SAMUEL APPLETON,

Manager and Attorney for the United States.

CHARLES J. OKELL & CO.

By C. V. JENSEN,

General Agent.

July 5th, 1917.

SCHEDULE OF OPERATIONS.

(Surgical Operations—see Section I.)

The amounts stated in the following "Schedule of Operations" are payable under this Policy if issued for Twenty-five Dollars Weekly Indemnity, proportionate amounts being payable if the policy is issued for a larger or smaller Weekly Indemnity.

AMPUTATION OF—

Foot, Hand or Forearm	$ 25.00
Leg or Arm	50.00
Thigh	100.00
Finger or Fingers	10.00

[66]

DISLOCATIONS, Reduction of—

Shoulder, Elbow, Hip, Knee or Ankle	$ 25.00
Wrist or Lower Jaw	15.00
Thumb or Fingers	10.00

EXCISION OF—

Shoulder, Hip or Knee-Joint	100.00
Elbow, Wrist or Ankle-Joint	50.00

Toe or Toes........................ 25.00

FRACTURES, Reduction of—

Nose, Lower Jaw, Collar-bone or Shoulder-blade......................... 25.00

Breast Bone........................ 10.00

Rib or Ribs........................ 10.00

Upper Arm.......................... 35.00

Forearm (one or both bones).... ... 25.00

Wrist or Hand...................... 15.00

Fingers 10.00

Any of the Bones of the Pelvis or Sacrum............................. 50.00

Coccyx............................. 10.00

Thigh.............................. 75.00

FRACTURES—Continued—

Knee Cap or Leg Bones (one or both)..$ 50.00

Bones of Foot...................... 15.00

Toe or Toes........................ 10.00

GUNSHOT WOUNDS—

Treatment not necessitating Amputation or Laparotomy................ 25.00

HERNIA (Abdominal)—

Any cutting operation for the radical cure of the Reducible, Irreducible or Strangulated form................ 100.00

LAPAROTOMY (opening of the abdominal cavity for an operation on any organ contained therein, or for Traumatic Peritonitis, or Exploratory Incision) 100.00

NECROSIS (death of bone)—

Sequestrotomy (removal of dead bone) 35.00

PERITONITIS (See Laparotomy)....... 100.00

SKULL TREPHINING for fracture...... 100.00
SYNOVITIS (inflammation of the lining membrane of a joint)
Incision............................ 25.00
TETANUS—
Injection of anti-tetanic serum into frontal lobe of brain................ 100.00
WOUNDS OF SCALP or other parts—suturing.......................... 5.00
[67]

EXHIBIT "B."

RENEWAL POLICY No. 269003.

Principal Sum—$7500.00 Premium $25.00
Weekly Indemnity—$25.00.

Renewal of Policy No. MR–389194–236081.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

United States Branch: Chief Office 33 Broad Street, Boston, Mass.

In consideration of the sum of $25.00 Accident or Disability Policy No. MR–389194 issued to Leonard Edwin Chenery of San Francisco (City or Town), San Francisco (County), California (State), is hereby continued in force for the term of twelve months from noon of the 5th day of July, 1922, to noon of the 5th day of July, 1923, subject to all the agreements and conditions in the aforesaid Policy.

SAMUEL APPLETON,
Manager and Attorney for the United States.

This renewal receipt will not be valid until

countersigned by the duly authorized agent of the corporation at San Francisco, California.

CHARLES J. OKELL & CO.,
C. V. JENSEN,
Agent.

Date June 23d, 1922. [68]

EXHIBIT "C."

RENEWAL RECEIPT No. 295441.

Principal Sum—$7500.00 Premium $25.00
Weekly Indemnity—$25.00

Renewal of Policy No. MR–389194–269008.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

United States Branch: Chief Office 33 Broad Street, Boston, Mass.

In consideration of the sum of $25.00 Accident or Disability Policy No. MR–389194 issued to Leonard Edwin Chenery, of San Francisco (City or Town), San Francisco (County), California (State), is hereby continued in force for the term of twelve months from noon of the 5th day of July, 1923, to noon of the 5th day of July, 1924, subject to all the agreements and conditions in the aforesaid Policy.

SAMUEL APPLETON,
Manager and Attorney for the United States.

This renewal receipt will not be valid until

countersigned by the duly authorized agent of the corporation at San Francisco, California.

CHARLES J. OKELL & CO.,

C. V. JENSEN,

Agent.

Date June 25, 1923. [69]

EXHIBIT III.

Claim Department.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

CHARLES J. OKELL & CO.

General Agents for the Pacific Coast.

334 Pine Street.

Samuel Appleton,
United States Manager,
Boston.

San Francisco, Cal., Dec. 18, 1923.

In replying quote this No. ——.

Leonard Edwin Chenery, Esq.,
245 California Street,
San Francisco, California.

Dear Sir:

RE: POLICY No. MR-389194.

Referring to your claim under the above policy on account of the death of Mrs. Chenery, we beg to state that we referred the case to Counsel in New Zealand and had it carefully investigated there. We find that the case does not come within the coverage of the beneficiary clause of the policy.

Section H provides for insurance of the beneficiary while traveling "a public conveyance provided by a common carrier for passenger service." The investigation shows that at the time of Mrs. Chenery's death she was not on a public conveyance provided by a common carrier for passenger service and consequently the claim is not covered by the policy.

Yours very truly,

E. BRADBURY,

Supt. Pacific Coast Claim Dept.

EB: AT.

Service admitted this 12th day of Dec., 1924.

REDMAN & ALEXANDER,

Attys. for Defendant.

[Endorsed]: Filed Dec. 18, 1924. Walter B. Maling, Clerk. [70]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

STIPULATION WAIVING AMENDMENT TO PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties hereto that the defendant herein hereby waives the proposal of any amendments to the bill of exceptions as presented by the plaintiff, and that the same may be settled and allowed in the form as proposed by plaintiff.

Dated: December 16, 1924.

WALLACE & AMES,
Attorneys for Plaintiff.
REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 18, 1924. Walter B. Maling, Clerk. [71]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

CERTIFICATE TO BILL OF EXCEPTIONS.

I, George M. Bourquin, Judge of the above-entitled court, do hereby certify that the annexed bill of exceptions in the above-entitled action is a true bill of exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record in said cause.

Done in open court this 18th day of December, 1924.

BOURQUIN,

Judge of the District Court.

[Endorsed]: Filed Dec. 18, 1924. Walter B. B. Maling, Clerk. [72]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now Leonard Chenery, as Administrator with the Will Annexed of the Estate of Edith P. Chenery, deceased, plaintiff herein, and complains and states that on the 11th day of November, 1924, the above-entitled court entered judgment herein in favor of the defendant above named and in the proceedings had prior thereto in the above-entitled action, certain errors were committed to the prejudice of this plaintiff, all of which appear in detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: December 18th, 1924.

WALLACE & AMES,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 18, 1924. Walter B. Maling, Clerk. [73]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now Leonard Chenery as Administrator with the Will Annexed of the Estate of Edith P. Chenery, deceased, plaintiff in the above-entitled action, and plaintiff in error herein, and in connection with his petition for a writ of error on file herein makes the following assignment of errors on which he will rely and which he will urge in the prosecution of said writ of error in the above-entitled action, which errors occurred at the trial of the said cause:

I.

The Court erred in granting the motion of the defendant herein for a verdict to be directed in its favor and directing a verdict in favor of defendant accordingly. The proceedings in that respect

were as follows: At the close of the evidence offered on behalf of plaintiff, and defendant offering no evidence, the Court made its ruling in the following language:

> "The COURT.—At the conclusion of the evidence in this case the defense moved that the jury be directed to return a verdict in its favor on the ground that the evidence had failed to make out a case which would support any verdict for the plaintiff.
>
> The action is upon an insurance policy, which has a not unusual provision, namely, that while it insures the [74] life of the husband for the benefit of the wife, it contains a provision insuring the wife to a certain extent, namely, while a passenger in or on a public conveyance, including platform, steps, or running board—words indicating somewhat the character of a public conveyance, provided by a common carrier for passenger service; that is to say, if the wife is injured or killed while a passenger in or on a public conveyance provided by a common carrier for passenger service, the insurance company will pay a certain amount, depending upon the extent of the injuries. The beneficiary, the wife in this case, was killed, according to the evidence, under circumstances that have been detailed, namely, while riding in an automobile from near the farm where she was a visitor, through one town, Clevedon, to another town on the railroad. The contention of the plaintiff is that she was thus injured

while a passenger in a public conveyance provided by a common carrier for passengers. The case has been argued, the evidence is without conflict, there can only be one question involved in it, and that is whether or not the conveyance was a public conveyance provided by a common carrier at that particular time and place where the wife was injured. Both parties have argued the matter and submitted a a good deal of law, but there are a few considerations the Court deems controlling, and will state them briefly.

In the first place, while it is true that insurance policies, where they are ambiguous, are to be construed as favorably in behalf of the insured and the beneficiary as they will bear, the Court finds nothing whatever ambiguous in this particular policy. A public conveyance provided for passengers by a common carrier has a well-defined and settled meaning, namely, a conveyance provided by one who is a common carrier for the indiscriminate use of the public, not necessarily between fixed points, or at a settled price, but one which he is under obligation as a common carrier to render service with when called upon by any of the patronizing public. The reasons for this limitation in the policy—for injuries received by the beneficiary while in a public conveyance provided by a common carrier of passengers, is very plain, namely, a public conveyance; and a common carrier is required to exercise a very much higher degree

of diligence for the safety of the passenger than a private conveyance will exercise as required by the law, and, therefore, the insurer—the company—in order to secure to itself as much protection as possible in this collateral insurance of the wife, limits the circumstances under which it will pay to the one where she is injured in one of these conveyances operated by a common carrier, and those under and subject to a very high degree of care and diligence on the part of those who convey; it was not willing to accept the responsibility of a mere private carrier, and in a private conveyance, from whom is not exacted that same degree of care and diligence. So much for that.

Now, the distinction between a private carrier and a common carrier is well settled. In some instances either may deviate from their settled character and perform the functions of another. A private carrier is one who usually will carry on special contracts, when he sees proper; and [75] does not hold himself out to be patronized by the public generally, and who is not bound to accept any passengers or engage in any contract of carriage unless he sees fit. A common carrier, however, is one whose labors are exclusively devoted to carrying the public on their demand. He is under a burden and a duty to carry anybody who come along and patronize him at the times fixed, of course subject to time-tables, and subject to

his rates, and at a fixed price, may also on occasion be immaterial. He is not necessarily limited to a definite rate or to a fixed termination, but he is bound to give service to the public. It is not left to his whim to select his customers. The law in respect to taxicabs, automobiles and carriers of that character is not altogether clear, and not altogether settled, for the reason that the same carrier may serve partially as a private carrier and partially as a common carrier. For instance, in the case of a taxicab company, which is licensed by the city, which has an engagement with a railroad terminal, we will say, that is a case that the Supreme Court has passed on, to carry passengers from railroad depots to hotels, or any other place in the city, and generally at rates fixed or subject to be fixed by the governing authority of the city: In that case the taxicab man is a common carrier; he is bound to take any passenger at the depot who behaves himself and is a fit subject for carriage, and who will pay the fare. If the fares fixed by the city do not cover all points in the city, or all distances, there would be special contracts on occasion. But this same taxicab man, aside from the times when he is receiving passengers from depots and carrying them about the city, may operate as a private carrier. He may engage himself to anyone who wants to hire him on a special contract, for a special trip, at a special price, for a special number of passengers.

To that extent he is a private carrier. He does not find himself under the obligation again to exercise that same high degree of care and diligence for the safety of the passenger that the common carrier does. His liabilities and his rights depend entirely upon the separate contract he makes with the individual.

The Supreme Court of the United States has dealt with the proposition now before the Court in Terminal Association vs. Kutz, 241 U. S., where they drew that distinction and pointed out, that the taxicab man—owner—proprietor—in so far as he was subject to contract to wait at hotels and carry passengers from and to hotels, or to wait at the railroad terminal and carry from or to the railroad, was a common carrier. But wherein he received calls at his own garage, over the 'phone or otherwise, for special engagements, and special trips, at contract rates to be fixed by himself, he was performing a duty simply within the bounds of private contract, and was not a common carrier. Of course, that question involved the question as to how far the city could control and govern his actions as a public utility; but the fact that he was held not to be within the law as to a public utility in respect to his private engagements, was dependent entirely upon the fact that to that extent he was not by the Court held to be a common carrier. [76]

Now, we cannot go any further for authority than the Supreme Court of the United States. This court is subject to it. Its decisions are subject to review, in the last analysis, by that court, and it is our duty to follow that court.

Now, fitting the law to the circumstances of this case, here is a man, Ward, whom the evidence shows was a common carrier between the town of Clevedon and the railroad terminal; he was licensed by the town to carry passengers between those two places; he had a time-table; he performed three round trips a day. There was nothing to indicate that he was obliged to perform any other trips. Just exactly the same as a railroad which has its time-table, those who want to travel must conform to the railroad's time, if they want to take advantage of its powers as a common carrier. The court would not say that a railroad running a special train on a special occasion would not be a common carrier, but, again, that is different from this case. Ward was not obliged to go beyond the town of Clevedon to pick up passengers. Those who wanted to patronize him would come there. He would pick up any on the road between Clevedon and Papakura, but he was not obliged to and could go elsewhere. There is evidence that on one occasion, or two, perhaps, he had visited this ranch. But whether or not under the same circumstances as the case and the occasion involved in this case, does not appear. On

this particular day he received a call from one of the ladies at the ranch. This ranch was six miles beyond the town of Clevedon, which was the end of his regular run. He received a call out of his regular hours. He was asked if he would come and take a party to the railroad, and he answered that he would, and he did go. He made a special trip, for a special party, at a special time, off of his regular run, and for special compensation; whereas his regular price was 3 shillings for this trip for four passengers, he was to get something like 35 shillings—a very handsome and substantial increase. It is true that where the accident occurred, and after he had received his party and was driving to Clevedon to Papakura, he was then on his regular run, but still it was a single, *indivisible* and entire trip—a single, individual and entire contract and engagement, made not for his regular run, but to go far beyond it and take a special party on a special occasion and at a special price.

The Court cannot see that this case does not come clearly within the rule laid down by the Supreme Court in the Terminal case, 241 U. S. In other words, at this time and place where this unfortunate lady met her death, she was not riding in a public conveyance provided by a common carrier of passengers. He had laid aside, for the time being, his character as a common carrier. The conveyance at that time bore, not the character of a public con-

veyance, but to all intents and purposes was private for this particular party. Ward was a private carrier. The principles involved in the case are adverted to in the case of Santa Fe Railroad Co., 228 U. S., where the court points out that even a common carrier may occasionally lay aside his capacity of a common carrier, enter the domain of a private carrier, and be held only to his contractual obligations. [77]

For these reasons, holding, as I do, that the policy, when it said 'common carrier in a public conveyance,' meant what it said, to give to the insurance company the benefit of the high degree of diligence exacted of a common carrier, the Court is bound to and does hold that this case is not within the policy.

The motion for a directed verdict is granted.

Gentlemen of the Jury, there is nothing for you to decide in the case. It is simply a question of law. The juror in the end seat will sign the verdict."

Mr. AMES.—I desire to take an exception to the ruling of the court."

The COURT.—It will be noted."

To the said ruling of the Court the plaintiff duly excepted, which exception is designated herein as Exception No. 1.

II.

The Court erred in refusing to permit the witness Hilda M. Graves to testify as to the character of the motor-bus upon which Edith P. Chenery was a

passenger. The proceedings in that respect were as follows:

> "Mr. AMES.—Q. I don't wish to lead you, Mrs. Graves, but I want to bring these matters out. Did you have any conversation with Mr. Ward with reference to this motor-bus that you got on at Clevedon?
>
> Mr. ALEXANDER.—We object to that as being immaterial, irrelevant and hearsay.
>
> The COURT.—What is the object of it?
>
> Mr. AMES.—The object is to prove that this is the bus that he regularly used on this run, and so is admitted.
>
> Mr. ALEXANDER.—We object to that as hearsay and not binding on the defendant.
>
> The COURT.—I am inclined to think so. Objection sustained."

To said ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 2.

III.

The Court erred in sustaining the objection of the defendant to the testimony of the witness Hilda M. Graves as to whether or not the driver of the automobile bus had a regular run connecting with the railroad train. The proceedings in that respect were as follows: [78]

> "Mr. AMES.—Q. Do you know the fact that he had a regular run connected with the railroad train? A. I do.
>
> Mr. ALEXANDER.—I object to that unless

it is shown she knows of her own knowledge, and not by hearsay.

The COURT.—She has answered she knows.

Mr. AMES.—Q. Has he?

Mr. ALEXANDER.—Before that question is answered, may I ask a question as to the means of her knowledge?

The COURT.—You may.

Mr. ALEXANDER.—Q. Do you know anything about that of your own knowledge, except the particular ride you were on? A. No.

Q. Only what was told you by others?

A. What the man, himself, told me that day.

Mr. ALEXANDER.—We object to the testimony as hearsay, and not of her own knowlledge.

The COURT.—Objection sustained."

To said ruling of the Court the plaintiff duly excepted which exception is herein designated as Exception No. 3.

IV.

The Court erred in sustaining the objection of the defendant to the testimony of the witness, Jessie L. P. Perry, relative to whether or not the driver of the automobile served the public generally. The proceedings in that respect were as follows:

"Mr. AMES.—Q. Do you know whether or not he serves the public generally?

Mr. ALEXANDER.—We object to that as immaterial, irrelevant and incompetent, and calling for the witness' conclusion. It is a question of law.

The COURT.—It is leading, for one thing. You may ask her details to find out what she knows. Objection sustained.

Mr. AMES.—Exception.

Q. Mrs. Berry, what do you know with reference to the occupation of Mr. Ward, as to whether or not he serves the public generally?

Mr. ALEXANDER.—We object to that upon the same ground. We have no objection to the lady stating what she observed. What she learned by hearsay is not competent.

The COURT.—She may answer. Objection overruled.

A. He serves the public generally, because I always paid him my fare.

Mr. ALEXANDER.—I move that that be stricken out as not responsive, and it is a legal question, rather than stating what she knows as to the facts.

The COURT.—I think so. The answer will be stricken."

To said ruling of the Court the plaintiff duly excepted which exception is herein designated as Exception No. 4.

V.

The Court erred in sustaining the objection of the defendant to the testimony of Mrs. Jessie L. P. Berry, relative [79] to her understanding that the driver of the automobile bus did serve anyone. The proceedings in that respect were as follows:

"Mr. AMES.—Q. And your understanding is

that he will go and serve anyone, even those out in the outlying ranches?

Mr. ALEXANDER.—We object to that. What she understands is not competent.

The COURT.—Objection sustained."

To said ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 5.

VI.

The Court erred in overruling the objection of the plaintiff to the question addressed to the witness J. Ward, relative to his hiring out automobiles privately. The proceedings in that respect were as follows:

"Is it not a fact that you hired out automobiles privately in addition to the automobiles used on the regular run from Clevedon to Papakura?

Mr. AMES.—The same objection to all this line of testimony, your Honor.

The COURT.—It will be admitted over the objection."

To said ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 6.

VII.

The Court erred in overruling the objection of the plaintiff to the question addressed on cross-examination to the witness J. Ward, relative to his carrying on a general garage business. The proceedings in that regard were as follows:

"Q. Is it not a fact that at the time of the

accident you were carrying on a general garage business?

Mr. AMES.—I object to the question as immaterial, irrelevant and incompetent as to what other business he may have had.

The COURT.—It is cross-examination; objection overruled."

To said ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 7.

VIII.

The Court erred in overruling the objection of the plaintiff to the question asked on cross-examination of the witness [80] J. Ward, relative to his being agent for certain automobiles. The proceedings in this respect were as follows:

"Q. Were you also at that time agent for certain automobiles?

Mr. AMES.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—It is cross-examination. Of course, if he was a common carrier, or was acting within the conditions of the policy, it would be immaterial, but this is cross-examination. Objection overruled."

To said ruling of the Court, the plaintiff duly excepted, which exception is herein designated as Exception No. 8.

IX.

The Court erred in overruling the objection of plaintiff to the question asked of the witness J. Ward on cross-examination relative to his hiring

out cars for private use. The proceedings in this respect were as follows:

"Q. Was it your practice at the time of the accident to hire out cars for private use with drivers?

Mr. AMES.—The same objection.

The COURT.—Objection overruled."

To said ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 9.

X.

The Court erred in overruling the objection of the plaintiff to the question directed on cross-examination to the witness J. Ward, relative to arrangements made to take Mrs. Chenery and party on the occasion in question. The proceedings in that respect were as follows:

"Q. Was it pursuant to that branch of your business that arrangements were made to take Mrs. Chenery and party from the Humphreys Davies Farm to Papakura?

Mr. AMES.—I object to that as immaterial, irrelevant and incompetent. The foundation is that it was his partner's business.

Mr. ALEXANDER.—No, he didn't say that; he said that he took cars privately; he said it was part of his regular business.

Mr. AMES.—Also the further objection that even if that were so it would not make him out to be anything but a common carrier.

The COURT.—I suppose that is one of the issues in the case. I think he may answer the

question. It will be controlled by instructions at the proper time."

To said ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 10. [81]

XI.

The Court erred in overruling the objection of plaintiff to a question propounded to the witness George Humphreys-Davies relative to the nature of the conveyance upon which Mrs. Chenery left his house, and in denying plaintiff's motion to again read the answer to the said question after the cross-examination. The proceedings in that respect were as follows:

"Q. State whether or not this conveyance upon which Mrs. Chenery left your house on June 16, 1923, as a passenger for hire, was a public or private conveyance.

Mr. ALEXANDER.—We object to that on the following grounds: The witness was not there. It was three miles from his home. He could not have known what the facts were, because he was not there. It calls for the conclusion of the witness. It is leading. The transportation took place three miles from his home and he was not there.

The COURT.—Objection sustained.

Mr. AMES.—Your Honor, he could testify as to what J. Ward had in the way of a motor-bus.

The COURT.—He has testified already as to his public character in so far as it is gen-

erally known. I think when you reduce him to the particulars of this occasion he could not have known the details. Objection sustained."

Mr. AMES.—Now, I renew my requests to have the answer to question 23 allowed, on the ground that Mr. Alexander's objection that no proper foundation has been laid has been obviated by the cross-examination.

The COURT.—What is there in the cross-examination?

Mr. AMES.—He asked several questions about how she went.

The COURT.—Any objection?

Mr. ALEXANDER.—Yes, your Honor. I simply fixed the places of these different points.

The COURT.—Motion denied."

To these rulings of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 11.

XII.

The Court erred in sustaining the objection of defendant to a question asked the witness Ethel Humphreys-Davies relative to the nature of the conveyance in which Mrs. Chenery left her house and in refusing to allow the motion of plaintiff renewing his offer of said testimony. The proceedings in that respect were as follows:

"Q. State whether or not this conveyance upon which Mrs. Chenery left your house on June 16, 1923, as a passenger for hire, was a public or private conveyance. [82]

"Mr. ALEXANDER.—Objected to as call-

ing for the legal conclusion of the witness, as leading, and it does not appear that she knows.

"The COURT.—Objection sustained.

"Mr. AMES.—Now, I would like to renew my offer of question No. 24 on direct examination of Mrs. Humphreys-Davies on the ground that the foundation was laid in question 12 of the cross-interrogatories.

Mr. ALEXANDER.—It is exactly the same situation, your Honor.

The COURT.—Motion denied; objection sustained."

To this ruling of the Court the plaintiff duly excepted, which exception is herein designated as Exception No. 12.

WALLACE & AMES,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 18, 1924. Walter B. Maling, Clerk. [83]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND APPROVING COST BOND.

On this day came the plaintiff Leonard Chenery, as administrator with the will annexed of the estate of Edith P. Chenery, deceased, by his attorneys, Messrs. Wallace & Ames, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and an assignment of the errors to be urged by him, and praying also that a transcript of the record and proceedings in the above-entitled cause with all things concerning the same be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and it further appearing that the said plaintiff has heretofore filed a cost bond in the sum of $300 Three

Hundred Dollars on appeal, which bond is hereby approved. On consideration whereof the court does hereby allow a writ of error as prayed for and it is now therefore

ORDERED that the writ of error issue and that all proceedings on the judgment of said cause be stayed pending the prosecution herein of the said writ of error.

Dated: This 18th day of December, 1924.

BOURQUIN,
Judge of the District Court.

[Endorsed]: Filed Dec. 18, 1924. Walter B. Maling, Clerk. [84]

(COST BOND ON APPEAL.)

KNOW ALL MEN BY THESE PRESENTS, That we, Leonard Chenery, as administrator with the will annexed of the estate of Edith P. Chenery, deceased, as principal, and National Surety Company, a corporation, as sureties, are held and firmly bound unto The Employer's Liability Assurance Corporation, a corporation, in the full and just sum of Three Hundred ($300) Dollars, to be paid to the said The Employer's Liability Assurance Corporation, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of

December, 1924, in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said court, between Leonard Chenery, as administrator with the will annexed of the estate of Edith P. Chenery, deceased, plaintiff and The Employer's Liability Assurance Corporation, a Corporation, defendant, a judgment was rendered against the said plaintiff, and the said plaintiff Leonard Chenery, as administrator as aforesaid, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant The Employer's Liability Assurance Corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California:

Now, the condition of the above obligation is such, that if the said plaintiff, Leonard Chenery, as aforesaid, shall prosecute his writ of error to effect, and answer costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

LEONARD CHENERY, as Administrator
With the Will Annexed of the Estate
of Edith P. Chenery, Deceased. (Seal)
By ALDEN AMES, (Seal)
His Attorney.

(Seal National Surety Co.)

NATIONAL SURETY COMPANY,

T. F. OGG,

Its Attorney-in-Fact.

Acknowledged before me the day and year first above written.

———————————.

[Endorsed]: No. 17,020. United States District Court for the Northern District of California, Southern Division. Leonard Chenery, as Admr., etc., vs. The Employer's Liability Assur. Corp. Cost Bond on Appeal. Filed Dec. 18, 1924. Walter B. Maling, Clerk.

Form of bond and sufficiency of sureties approved.

BOURQUIN,

Judge. [85]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,020.

LEONARD CHENERY, as Administrator With the Will Annexed of the Estate of EDITH P. CHENERY, Deceased,

Plaintiff,

vs.

THE EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco a copy of the record in the above-entitled cause as a return to the writ of error heretofore sued out of said Circuit Court of Appeals to review the judgment in said cause, consisting of the following files and records and proceedings in said cause:

Third amended complaint.
Answer to third amended complaint.
Verdict and judgment.
Bill of exceptions.
Stipulation waiving amendment to bill of exceptions.
Certificate to bill of exceptions.
Petition for writ of error.
Order allowing writ of error reciting approval of cost bond and that writ of error issue.
Writ of error and admission of service on same.
Citation on writ of error and admission of service of same.
Assignment of errors.
This praecipe.

WALLACE & AMES,
Attorneys for Plaintiff in Error.

Service of the within admitted this 23d day of December, 1924.

REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 23, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [86]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing eighty-six (86) pages, numbered from 1 to 86, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitutes the record on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing return to writ of error is $40.75; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of December, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [87]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Leonard Chenery, as Administrator with the Will Annexed of the Estate of Edith P. Chenery, Deceased, Plaintiff and Plaintiff in Error, and The Employer's Liability Assurance Corporation, a Corporation, Defendant and Defendant in Error, a manifest error hath happened, to the great damage of the said Leonard Chenery, as Administrator with the Will Annexed of the Estate of Edith P. Chenery, Deceased, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof,

in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 18th day of December, in the year of our Lord one thousand nine hundred twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

Allowed by:

____________________,
Judge. [88]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to The Employer's Liability Assurance Corporation, Limited, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Southern

Division, Second Division, wherein Leonard Chenery, as Administrator with the Will Annexed of the Estate of Edith P. Chenery, Deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, United States District Judge for the District of Montana, designated to hold and holding this Court, this 18th day of December, A. D. 1924.

BOURQUIN,

United States District Judge.

Service and receipt of a copy of the within ——— is hereby admitted this 20 day of Dec., 1924.

REDMAN & ALEXANDER,

Attorneys for Deft.

[Endorsed]: No. 17,020. United States District Court for the Northern District of California, Southern Div. Leonard Chenery, as Administrator With the Will Annexed of the Estate of Edith P. Chenery, Deceased, Plaintiff in Error, vs. The Employer's Liability Assurance Corporation, a Corporation, Defendant in Error. Citation on Writ of Error. Filed Dec. 23, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [89]

[Endorsed]: No. 4449. United States Circuit Court of Appeals for the Ninth Circuit. Leonard Chenery, as Administrator With the Will Annexed of the Estate of Edith P. Chenery, Deceased, Plaintiff in Error, vs. The Employer's Liability Assurance Corporation, Limited, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 29, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

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Appellant,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED (a corporation),

Appellee.

OPENING BRIEF FOR APPELLANT.

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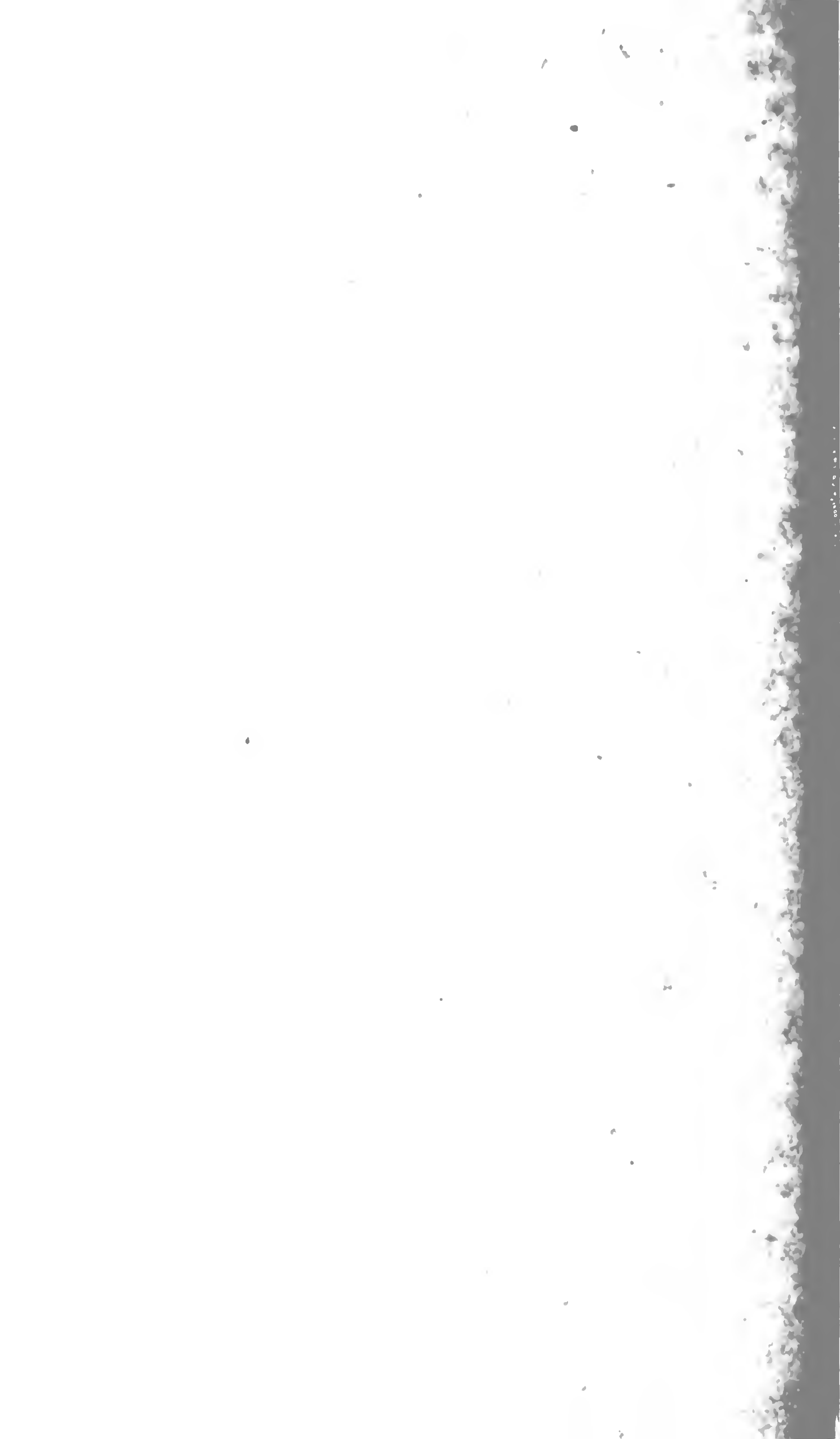

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Statement of the Case.

This is a suit upon a policy of insurance providing indemnity for loss of life and injuries resulting from accidental means. The policy provides, among other things, that in the event of the death of the beneficiary, Edith P. Chenery, payment shall be made of two-thirds of the principal sum of seven thousand and five hundred dollars ($7,-500.00), namely five thousand dollars ($5,000.00), to the legal representatives of the beneficiary. This action is brought by Leonard Chenery, as administrator with the will annexed of the Estate of Edith

P. Chenery, deceased, her legal representative to recover this amount.

The particular provision under which the liability of The Employers' Liability Assurance Corporation, Ltd., the defendant in error, is sought to be enforced, is found in Section H. of the policy which reads as follows (page 72, Transcript):

"SECTION H.

BENEFICIARY BENEFITS.

If one person only is specifically named as the Beneficiary in the 'Schedule of Warranties' hereinafter contained and such person is not under 18 or over 60 years of age, and is in sound condition mentally and physically; then, and not otherwise, this Policy shall also insure such Beneficiary against bodily injuries sustained during the term of this Policy, solely and independently of all other causes through external, violent and accidental means (suicide whether sane or insane is not covered), and received; while a passenger in or on a public conveyance (including the platform steps or running-board thereof) provided by a common carrier for passenger service (including Pullman cars); or while riding in a passenger elevator or escalator; or in consequence of the burning of a building while the Beneficiary is therein, as follows:

For Loss of

Life..........................Two-thirds of Principal Sum."

It was proven at the trial of the case that this policy was in effect on the date of the death of Edith P. Chenery, premiums fully paid. It is not disputed that the formal provisions of the policy relating to the giving of notice to the Assurance

Corporation were complied with and liability denied by it.

Evidence was given, without contradiction on the part of the Assurance Corporation, that Edith P. Chenery died June 16, 1923. At the time of her death she was within the age limits prescribed and in sound condition mentally and physically. The cause of death was, solely and independently of all other causes, through external, violent and accidental means and not by suicide.

The Assurance Corporation denied, however, that she was

> "a passenger in or on a public conveyance (including the platform steps, or running board thereof) provided by a common carrier for passenger service * * *".

The proof relating to this fact was submitted upon the testimony of witnesses for the plaintiff in error, no testimony being offered by the Assurance Corporation.

It appeared without contradiction that on June 16, 1923, Mrs. Chenery was visiting at the home of her brother-in-law, George Humphreys-Davies, in New Zealand. Mr. Davies was the owner of a ranch about nine miles from the town of Clevedon. In going from this ranch to the railroad station which was at the town of Papakura, Mrs. Chenery and her party, consisting of Mrs. Hart (now Mrs. Graves, a witness at the trial), Mr. Spence and Miss Edge, took a farm cart to the road passing by

the ranch of E. Brown, a distance of about three miles, thence by a Ford automobile driven by J. Ward (whose regular business was the carrying of passengers, luggage and small merchandise) to Clevedon, a distance of about six miles; at Clevedon they changed to a Dodge motor-bus also operated by Ward; thence along the road to Papakura which was a distance of about eight miles from Clevedon.

Ward met the party at Brown's ranch by appointment made over the telephone by either Mrs. Davies or Mrs. Chenery. He took them over the above route past the town of Clevedon. At the town of Clevedon they changed at the suggestion of Ward, to his regular motor-bus, a Dodge car specially constructed for carrying passengers. He also carried at the same time a loaf of bread and a newspaper for delivery on the route as this was part of his business.

On the way from Clevedon to Papakura the Dodge motor-bus fell over an embankment and Mrs. Chenery was killed almost instantly.

The contention urged by the defendant was that Ward was on this occasion not acting in the capacity of common carrier and therefore there was no liability under the provision of the policy above quoted. Plaintiff in error maintained that he was a common carrier and that the defendant was liable under the express terms of its policy.

The trial judge ruled in favor of the defendant in error on its motion for a directed verdict (Transcript pages 57-64).

The principal question then before this Court is whether or not such ruling is correct.

The Court also ruled against plaintiff in error on questions of the admissibility of certain evidence bearing directly upon this issue, exception to which is taken (Assignment of Errors, Transcript pages 101-110).

I.

THE COURT ERRED IN GRANTING THE MOTION OF DEFENDANT IN ERROR FOR A DIRECTED VERDICT.

The evidence clearly shows that the deceased was at the time of her death a passenger in or on a public conveyance provided by a common carrier for passenger service.

The testimony of Hilda M. Graves, witness for the plaintiff in error, was as follows (Transcript pages 18 et seq.):

"My name was formerly Mrs. Hilda Hart. I was a visitor at the home of Mrs. Davies in New Zealand on June 16, 1923. Mrs. Chenery, Mrs. Spence, Miss Edge and myself left Mrs. Davies' home on that day to go to the railroad station at Papakura. We started in a horse drawn cart to a place somewhere along the road where we were met by Mr. Ward who was operating a Ford car.

It was Ward's regular business to carry passengers.

We were in the Ford half or three-quarters of an hour—possibly about six miles—and at Clevedon changed to a motor-bus.

That motor-bus had, as I recollect, four seats. There were three of us in the back seat. The main part of the car was filled with luggage. Mr. Spence and the driver, Mr. Ward, sat on the front seat. Mrs. Chenery, Miss Edge and myself sat on the rear seat.

It looked like a very large automobile to me, what we would call a motor-bus as distinguished from a pleasure car. The seats were very wide; they held three people; there was an extra seat in the middle. Its appearance was distinctly that of what we call a motor-bus as distinguished from a private car.

We drove, I suppose, half or three-quarters of a mile from Clevedon in this bus and it was dark, half past five, and raining and we slipped over an embankment and the motor-bus overturned and we went into a river. After that, I don't know just what happened for some time."

On cross-examination:

"Mrs. Davies telephoned for the driver to come. He came pursuant to that telephone message. We were transferred to a large machine at Clevedon. The driver, himself, requested the change to be made."

The testimony of Jessie L. P. Berry, witness for plaintiff in error was as follows (Transcript page 25 et seq.):

"I am a sister of Mrs. Davies and Mrs. Chenery. I have visited Mrs. Davies on several occasions. The last time I was there eight months and on a previous occasion six or seven months.

Mrs. Davies' ranch is about nine miles from Clevedon. The nearest railroad station is Papakura.

I know of my own knowledge the occupation of this Mr. Ward. He motored from Clevedon to Papakura taking passengers to and from trains and even to the ranch. It was his custom to get people from the ranches and take them to the trains. He has taken me from there.

I have never known him to refuse to serve anybody.

He usually stands in front of a little dry-goods store across the street from his home, I think it is; it is near the post office at Clevedon.

At Papakura he stands just as near to the train as he can get there. When the train arrives he solicits for passengers. I have seen him do that himself. He solicits passengers for Clevedon and along the road from Papakura to Clevedon; and he picks up passengers on the way.

He also solicits passengers at Papakura, at the railroad station, to the ranches in and around Clevedon.

I know he has taken me to the ranch; I cannot answer for anyone else. He is at the railroad junction soliciting anyone who comes at all trains.

There is an opposition line of motor-busses and there is competition between the two.

He solicits that trade going in the opposite direction, that is, to the railroad train from Clevedon out the ranch way. He operates that way as well. He has taken me from there several times. As nearly as I can remember I paid 30 shillings once from the ranch to Clevedon. I could not tell you whether that was his regular fare."

On cross-examination (page 29):

"I made a special bargain with him to get out. He does the same thing with other people. They make bargains with him. The railroad is at Papakura. There is no railroad at Clevedon. The Davies ranch is not on the road from Papakura to Clevedon, it is further on some nine miles beyond Clevedon."

On redirect (page 30):

"In answering counsel's question with reference to what he called a special contract, I don't mean to infer that this man does not carry everybody, he carries anyone who telephones him. I say, yes, he carries anyone.

I suppose you would call it a regular depot that he has at Clevedon. He has a stand there, a place where we go to get him; it is near the post office."

Deposition of John Massey Ward.

"My occupation is motor proprietor; that was my occupation in the month of June, 1923. I carried on my business under the name of Roberts & Ward. I have been engaged in that business five years.

I did not know Mrs. Edith P. Chenery prior to her death which occurred June 16, 1923. On that day I was in the business of operating a motor-bus or busses for hire to the public. I operated between Clevedon and Papakura. I used in carrying passengers from Clevedon to Papakura a Dodge passenger car lengthened to add seat in center for extra passengers. It carried nine passengers comfortably. I charged the regular rate of hire for passengers between these two towns, three shillings single fare, six shillings return. I made regular trips between these two towns. My route connected with the railroad at Papakura.

I was in the business of conveying between these two towns any passengers for hire who should apply to me for carriage between these two points. I served the public in general.

I carried upon my motor-bus in addition to passengers parcels or small merchandise.

My motor-bus travelled over the regular route between Clevedon and Papakura.

I know Mr. George Humphreys-Davies. He lives at Sandspit, nine miles from Clevedon. I have known him several years; also his wife who lives at the same place.

On June 16, 1923, I first saw Mrs. Edith P. Chenery at Whakatiri, six miles from Clevedon, where I went to pick her up. She requested me by telephone to call for her. I called for her at Whakatiri.

On the date mentioned Edith P. Chenery was a passenger in my motor-bus, but not on the regular Clevedon to Papakura run.

I took her from Whakatiri to the place of the accident. Mrs. Hart, Mr. Spence and a nurse whose name I cannot recall were with us. I carried them from Whakatiri to Clevedon in a Ford car and from Clevedon to the place of the accident in a Dodge car. We transferred to the Dodge car at Clevedon.

Nine passengers could ride in that motor-bus. As this was a special trip the charge would have been one pound fifteen shillings. From Whakatiri is a special fare, and a special fare rules after the usual run from Clevedon to Papakura. The ordinary fare from Whakatiri to Clevedon is fifteen shillings and from Clevedon to Papakura is three shillings.

On account of passengers' luggage there was not room for anyone else in the motor-bus.

Several bags and hampers were carried; I do not remember the exact amount.

On that occasion I had one loaf of bread and one newspaper to deliver along the route. They were not delivered.

I took the main road between Clevedon and Papakura. This was the regular route that I took for the purpose of carrying passengers to Papakura.

On June 16, 1923, while taking Mrs. Chenery and others to Papakura from Clevedon my car capsized, which resulted in the death of Mrs. Chenery.

At the time of this occurrence, Mrs. Edith P. Chenery was a passenger for hire in my motorbus."

Cross-interrogatories (page 38):

"My regular run was between Clevedon and Papakura. I first met Mrs. Chenery at Whakitiri where I took her into my automobile for transportation to Papakura. This point was not on my regular run from Clevedon to Papakura. It was about six miles away. Clevedon to Papakura is west. The place where I first met Mrs. Chenery and took her into my car is East from Clevedon about six miles. It is about eight miles from Clevedon to Papakura.

I first met Mrs. Chenery and took her into my automobile for transportation to Papakura on the road we call the Maori Road, opposite direction from the Papakura Road. I have no regular run of automobiles on the Clevedon-Freshwater Road, unless they were specially hired for such purposes. I do not know a road called the Freshwater. Was on the Maori Road to pick up Mrs. Chenery and party. Mrs. Chenery asked me by telephone. Payment has never been made for the services. Mrs.

Chenery arranged for payment. She was one of a party of four that constituted her party for whom transportation was desired from the Humphreys-Davies farm to Papakura.

The time of my regular runs from Clevedon to Papakura is three trips daily; leaving Clevedon at 7:00 o'clock A. M., 8:30 o'clock A. M. and 3:30 o'clock P. M. That automobile had not left Clevedon for these regular runs that day. The accident occurred some hours later. The last automobile left on the regular run from Clevedon to Papakura at 3:30 o'clock P. M. The automobile in which Mrs. Chenery was riding left Clevedon for Papakura at about half past five in the afternoon.

Several bags and hampers were in the automobile, I do not remember the exact amount. There were no other persons in the automobile besides Mrs. Chenery and the party of which she was a member, and myself.

At the time of the accident I had no other business than motor proprietor. My partner had a garage business. I had several automobiles. I never employed outside drivers. All driving done by either my partner or myself. It is a fact that I hired out automobiles privately in addition to the automobiles used on the regular run from Clevedon to Papakura. A person could engage an automobile from me privately for transportation from Clevedon to Papakura. I had at my garage automobiles which anyone could hire privately.

The regular fare on the regular run from Clevedon to Papakura was three shillings. The amount usually charged for transporting Mrs. Chenery from the Humphreys-Davies farm to Papakura was one pound fifteen shillings.

My last regular schedule run was to leave Clevedon at 3:30 in the afternoon. That was the last regular run for that day. If the automobile involved in the accident had not been specially hired for the services I would not have sent any automobile from Clevedon to Papakura after 3:30 in the afternoon of that day.

Mrs. Chenery rang me on the phone and asked me if I would come and pick them up. These arrangements were made by Mrs. Chenery by telephone.

My partner was at the time of the accident carrying on a general garage business. He was doing general repair work of automobiles and selling parts and materials for automobiles.

My firm employed one boy.

My partner was also at that time agent for certain automobiles. These did all of the work of the garage, attended to the regular run from Clevedon to Papakura, and also looked out for private calls where automobiles were specially hired.

It was my practice at the time of the accident to hire out cars for private use with drivers. It was part of my regular business. It was pursuant to that branch of my business that arrangements were

made to take Mrs. Chenery and party from the Humphreys-Davies farm to Papakura.

I had regular runs to places other than from Clevedon to Papakura.

Mrs. Chenery asked me before the accident what time the next train left Papakura and I told her 20 minutes to seven. She then said we would have plenty of time to drive slowly, as she was terribly nervous and that she was afraid to get in a motor car, boat or cart."

Deposition of George Humphreys-Davies.

(Page 46):

"My occupation is sheep-farmer.

I am a brother-in-law of Mrs. Edith P. Chenery. She was a visitor at my house just prior to June 16, 1923. She left on that day to go toward Auckland. Miss Edge, Mrs. Hart and Mr. Spence went with her. She went on a farm cart belonging to me to meet Ward's taxi at E. Brown's, a distance of about three miles. She was a passenger for hire, not on the cart, but on Ward's taxi. The cart was operated by a farm servant and the taxi by J. Ward.

J. Ward lives in Clevedon. His business in the month of June, 1923, was motor proprietor, licensed by Papakura Town Board to carry passengers for payment. He operates motor-busses between Clevedon and Papakura. I have ridden with him probably thirty-five or forty times.

He has a Dodge, chassis specially lengthened to hold extra seat between ordinary front and back seats. Specially built for hire service.

The charge made by Ward for carrying passengers between Clevedon and Papakura is three shillings and sixpence single fare and six shillings return. The fares fluctuate according to competition. Ward has a regular route between Clevedon and Papakura for the carrying of passengers. He also carries bread for the Papakura bakery every morning except Sundays, parcels and small baggage, independent of passengers.

Ward serves the public generally in the carrying of passengers, packages and other articles."

Cross-examination (page 50):

"I did not call up J. Ward and arrange for transporting these persons from my farm to Papakura. My farm is a continuation of the road which runs from Clevedon to Papakura. It is not on the run made regularly by Ward from Clevedon to Papakura. Papakura is on the remote side of Clevedon from my farm. There is a regular run from Clevedon to Papakura. My farm is about nine miles from Clevedon. It is on the same road which runs from Clevedon to Papakura but a continuation.

Mrs. Chenery first met Ward and began riding in his automobile at E. Brown's house, six miles from Clevedon.

They took hand baggage with them."

Deposition of Ethel Humphreys-Davies.

(Page 52):

"I am a sister of Edith P. Chenery. She was a visitor at my house just prior to June 16, 1923. On June 16, 1923, she went to Clevedon, enroute to Auckland.

She and her party were conveyed in a farm cart driven by a Maori as far as the unmetallized road. Then met by a Ford driven by Mr. J. Ward. Mrs. Chenery was not a passenger for hire aboard the cart but was on the car operated by J. Ward.

J. Ward lives in Clevedon. His business was garage and taxi and motor-bus service. He operated a motor-bus between Clevedon and Papakura. I have ridden in the motor-bus operated by him over twenty times.

It was a Dodge with specially lengthened chasis.

His charge for carrying passengers between Clevedon and Papakura was three shillings and sixpence single fare and six shillings return. Ward has a regular route between Clevedon and Papakura for the carrying of passengers. He also carries small parcels, papers, bread and small baggage.

Ward serves the public generally in the carrying of passengers, packages and other articles."

Cross-examination (page 55):

"I called up J. Ward and arranged for transporting these persons from my farm to Papakura. My farm is not on the road which runs from Clevedon to Papakura. It is not on the run which is

made regularly by Ward from Clevedon to Papakura. Papakura is on the remote side from Auckland from Clevedon. My farm is on the remote side from Clevedon. There is no regular run from my farm to Papakura nearer than Clevedon. My farm is nine miles from Clevedon. It is on an entirely different road than the road which runs from Clevedon to Papakura.

Mrs. Chenery first met Ward and began riding in his automobile in front of E. Brown's house, about three miles from my house. That point is about six miles from the beginning of his regular run from Clevedone to Papakura."

II.

WHETHER OR NOT A CERTAIN PERSON OR CORPORATION IS A COMMON CARRIER IS A QUESTION OF FACT TO BE LEFT TO THE JURY UNDER APPROPRIATE INSTRUCTIONS.

The question is not one of law alone but a question of fact also as to whether deceased was a passenger for hire upon a public conveyance operated by a common carrier.

> *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417; 113 N. E. 707;
>
> *Bare v. Amer. Fwding. Co.*, 242 Ill. 308; 89 N. E. 1021;
>
> *Groves v. Great Eastern Cas. Co.*, (Mo.) 246 S. W. 1002.

The trial judge without asking the assistance of the jury in this case upon facts which construed in

the light most favorable to the defendant show a conflict, made up his own mind that Ward, the driver of the motor-bus, was at the time of the accident a private and not a common carrier. In so doing he chose to utterly ignore the testimony of all of the witnesses that it was Ward's regular business to carry passengers. The fact that he was licensed to do so by the Town of Papakura is brushed aside. The undisputed circumstances that on this very trip he was also carrying small packages for delivery, also a part of his regular business as a common carrier, is held to be of no consequence. The fact that this accident was on his regular route for carrying persons and on his regular motor-bus specially built and used for this purpose seems to have had no weight. The testimony that he was not known by the witness to have ever refused to serve anyone is not even referred to.

Upon what then must this opinion be based? Apparently this motor-bus driver was changed in character from what was distinctly a common carrier to a private carrier by a telephone call.

The ruling of the trial Court,—without allowing the jury to pass on the question—comes down, in its last final analysis to just that and as authority for that point we are citing the decision of the U. S. Supreme Court in

> *Terminal Taxicab Co. v. Kutz,* 241 U. S. 252; 60 L. Ed. 984.

That case was an action *in equity* to restrain the Public Utilities Commission of the District of Co-

lumbia from exercising jurisdiction over the plaintiff. There was no jury or dispute of facts involved. The Court points out that as to a portion of its business the Taxicab Company *"asserts the right* to refuse the service". Based on that fact, and that alone, the Supreme Court says:

> "Although I have not been able to free my mind from doubt, the Court is of the opinion that this part of the business is not to be regarded as a public utility."

Taking the case for what it really holds, namely that the Taxicab Company as such was subject to the jurisdiction of the Commission as a common carrier as to the major part of its business and not so as to that part of the business where the company expressly asserts the privilege of refusing to accept contracts of carriage,—the case still leaves open two questions of fact to be determined in any subsequent case, namely:

> *First*—Does the carrier assert the privilege of refusing to carry?
>
> *Second*—If he does, then under which portion of his business is the carrier acting at the time in question?

We submit that in the case at bar there is not the slightest evidence that Ward "asserted the right to refuse the service". On the contrary there is direct evidence that he was never known to have refused to serve anyone.

Assuming even that he might have done so part of the time is there not still the second question as to *when* he is so acting?

These are all questions *of fact* for the jury.

Belfast Rope Work Co. v. Bushell, 1918 K. B. 211.

The same is true as to the question of whether or not a person is a passenger for hire on board the conveyance.

Hill's Admx. v. N. A. Accident Ins. Co., (Mo.) 215 S. W. 428;

Reynolds v. St. Louis Transit Co., (Mo.) 88 S. W. 50.

To hold otherwise is to resolve every doubt in the evidence *against the plaintiff.*

III.

THE COURT ON A MOTION FOR A DIRECTED VERDICT MAY NOT WEIGH THE EVIDENCE.

U. S. F. & G. v. Blake, 285 Fed. 449 (C. C. A., 9th Cir.):

"On a motion for a directed verdict, the Court may not weigh the evidence and if there is substantial evidence both for the plaintiff and defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence." (Citing cases.)

Texas v. Brilliant Mfg. Co., 2 Fed. (2nd) 1 (Dec. 1924, C. C. A.):

"Where there is evidence of a substantial character bearing upon the issue, the question is for the jury even though the Court may think

there is a preponderance of evidence for the party moving for a direction, City & Suburban Railway v. Svedborg, 194 U. S. 201, and this is true even though the Court, if called upon to find the facts, would have decided in favor of the moving party."

Glaria v. Washington Southern R. Co., 30 App. D. C. 559; cited in *Terminal Taxicab Co. v. Blum,* 298 Fed. 679:

"A motion to direct a verdict is an admission of every fact in evidence and of every inference reasonably deducible therefrom. The motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom and that view is utterly opposed to the plaintiff's right to recover in the case."

Mah See v. North American Accid. Insurance Co., 189 Cal. 415:

"This Court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deducted from those facts, there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury) and that the verdict of the jury or finding of the trial judge cannot be set aside by this Court on the ground that it is not sustained by the evidence."

In disposing of a motion for a directed verdict, trial Court must accept evidence as most favorable to party against whom motion is made, and deny it

if reasonable men may honestly draw different conclusions.

Leehy v. Detroit M. & T. etc. Ry., 240 Fed. 82;

Meers & Dayton v. Childers, 228 Fed. 640, affirmed in 241 U. S. 663;

So. Ry. Co. v. Clark, 233 Fed. 900;

Caroline etc. Ry. v. Stroup, 239 Fed. 75.

IV.

THIS SITUATION COMES DIRECTLY WITHIN THE SCOPE OF THE POLICY.

We might be content with the above citation of authorities showing error on the part of the trial Court in granting a directed verdict were it not for the fact that there have been many cases similar or analogous to the case at bar where it has been held that the operator of a motor-bus or taxicab like the one herein described is a common carrier and the insurance company made liable.

First briefly referring to the accepted definitions of a common carrier:

McCoy v. Pacific Spruce Corporation, 1 Fed. (2nd) 853 (C. C. A., 9th Cir., Oct. 20, 1924).

> "A common carrier is generally defined as one who by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges."

See also:

Cushing v. White, 172 Pac. 229 (Wash.).

Into this category without question falls the motor-bus and taxicab.

That the proprietor of a line of omnibuses and baggage wagons engaged in carrying passengers and baggage for hire between depots, hotels, etc., is a common carrier, is held in

Parmelee v. Lowitz, 74 Ill. 116; 24 Am. Rep. 276;

Transfer Co. which also carried passengers is a common carrier,—

Carlton v. Donbar, 88 S. E. 174 (Va. 1916);

Held a person hauling for hire with an ox team within a town for everyone who applied to him as a common carrier,—

Robertson v. Kennedy, 2 Dana (Ky.) 430; 26 Am. Dec. 466;

That a company engaged in the moving of household goods is a common carrier,—

Lloyd v. Haugh, 223 Pa. 148; 72 Atl. 516; 21 L. R. A. (N. S.) 188;

That a common carrier may not by words of its contract convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier,

Vandalia R. Co. v. Stevens, (Ind. App.) 114 N. E. 1001.

That a jitney bus is a common carrier, see:

Schoenfeld v. City of Seattle, 265 Fed. 726 (Dist. Ct. Wash. N. D.);
Nolen v. Reichman, 225 Fed. 812;
Lane v. Whitaker, 275 Fed. 476;
Packard v. Banton, 44 Sup. Ct. 257;
Ivancich v. Davies, 186 Cal. 520.

A case interpreting a clause in an insurance policy almost exactly similar to the one in ours is:

Primrose v. Casualty Co. of America, 232 Pa. 210; 81 Atl. 212; 37 L. R. A. (N. S.) 618.

The Court holds that a taxicab hired by deceased and several friends is a "public conveyance", and the company is liable.

> "The contention of the learned counsel for the appellant is that the double indemnity clause is applicable only to the case of a person occupying a place for which he pays a fare in a railway car or conveyance operated for the common use of himself and of such promiscuous persons as may happen to take passage en route, over which conveyance he exercises no control. It is to be noted that the clause was inserted by the insurer itself in the policy of insurance which it issued to the insured, and, if it intended that the same should have the restricted meaning for which its counsel now contend, it could have readily so worded the clause. The insurance company could have so framed it that there would now be no doubt that the appellee could not insist that it was intended to extend to her claim. It is next to be remembered that, as the words used in the clause are the language of the insurer, a salutary rule of construction requires them to be construed most favorably to the insured

(*Hughes v. Central Acci. Ins. Co.*, 222 Pa. 462, 71 Atl. 923; May, Ins. 175); and, for the same reason, if the clause is capable of two interpretations equally reasonable, that is to be adopted which is most favorable to the insured. *Bole v. New Hampshire F. Ins. Co.*, 159 Pa. 53, 28 Atl. 205; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. 53, 34 Atl. 16. 'If the language of the policy is doubtful or obscure, it will be construed most unfavorably to the insurer. *Merrick v. Germania F. Ins. Co.*, 54 Pa. 277 A contract of insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain should be preferred. *Humphreys v. National Ben. Asso.*, 139 Pa. 214, 11 L. R. A. 564, 20 Atl. 1047.' *Frick v. United Firemen's Ins. Co.*, 218 Pa. 409, 67 Atl. 743. As applied to the admitted facts in the present case, we regard the double indemnity clause as having but one meaning.

The Pennsylvania Taximeter Cab Company was engaged in the business of hiring automobiles to the public,—'to the public generally.' is the language of the witnesses describing its business. 'Anybody at all' who was financially responsible could hire one. The secretary and treasurer of the company testified: 'They would be hired to anyone for rides, or for other personal transportation as passengers, from wherever they might get them to wherever they might want to go.' The machines, however, were never turned over to the control and management of those who hired them, but were always operated by a chauffeur or driver in the employ of the company. All that those who rode in them did was to direct where they were

to go. They were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company, from which all but themselves were excluded; the only difference being that, as automobiles do not run on rails, the occupants could select their own traveling route; and *it is not to be pretended that the double indemnity clause does not include passengers riding on a specially chartered railroad car.*

The words, 'public conveyance provided for passenger service and propelled by gasoline,' are to receive a reasonable meaning. All conveyances are either for public or private use. The automobile in the case at bar was not one for merely private use. It belonged to a company which, as already stated, was engaged in the business of hiring automobiles for general public use. The use of no one of its machines was limited to any particular person, but anyone able to pay the price for the privilege of riding in it, while it was under the control of and being operated by one of the company's employees, could do so. In some cases a fare per head was charged for the use of the machine for a stipulated time, or for a specified journey; in other instances, there was a charge for the use of the car of so much by the hour, and, under this arrangement, the deceased and his friends hired the car in which they were riding."

Fidelity & Cas. Co. v. Joiner, 178 S. W. 806 (Tex. 1915),

is another case with almost precisely similar facts. The clause in the policy interpreted is:

"The amounts specified in the preceding articles shall be doubled if the bodily injury is sustained by the assured * * * (2) while in or on a public conveyance (including the

> platform, steps, or running board thereof) provided by a common carrier for passenger service."

The insured was traveling in an automobile furnished by a liveryman for the purpose of going to several towns to call on customers.

The Court says:

> "The automobile in which the assured was riding at the time the accident occurred belonged to the witness U. G. White, who operated a hotel and livery business in Whitesboro. White testified that in his business as a liveryman he owned and used horses, hacks, buggies, and two automobiles, which he hired to any one who applied to him for same and was willing to pay according to a schedule of charges he had established. He used the automobiles in his business like he did the buggies, except that he never hired them out without a driver, but always himself furnished drivers for them. His testimony, we think, was sufficient to support the finding of the jury that the automobile in which the assured was riding was a 'public conveyance provided for passenger service.' *Primrose v. Casualty Co.*, 232 Pa. 210, 81 Atl. 212, 37 L. R. A. (N. S.) 618; *Ripley v. Assurance Co.*, 16 Wall. 336, 21 L. Ed. 469.

In the case of:

> *Anderson v. Yellow Cab Co.*, 191 N. W. 748 (Wis. 1923)

the question came up in a personal injury suit as to the correctness of an instruction to the jury to the effect that a taxicab was a common carrier. The court distinguishes the case of *Terminal Taxicab Company v. Kutz,* then goes on to say:

"In order to constitute a public conveyance a common carrier, it is not necessary that it come within the definition of a public utility so as to be subjected to the rules and regulations of a public utility commission. *Newcomb v. Yellow Cab Co., Public Utility Reports* 1916B, page 985. To constitute the conveyance a common carrier it is not necessary that it should move between fixed termini, or even upon fixed routes. *Parmelee v. Lowitz,* 74 *Ill.* 116, 24 *Am. Rep.* 276; *Pennewill v. Cullen,* 5 Har. (Del.) 238. It has also been held that fixed charges are not an essential attribute of a common carrier of goods. *Jackson Architectural Iron Co. v. Hurlbut,* 158 *N. Y.* 34, 52 *N. E.* 665, 70 *Am. St. Rep* 432. Under the trend of modern judicial decisions it appears that the great weight of authority is in favor of holding a taxicab like that in the instant case as a public carrier. *Anderson v. Fidelity & Casualty Co.,* 228 N. Y 475, 127 N. E., 584, 9 A. L. R. 1549; *Cushing v. White,* 101 Wash. 172, 172 Pac. 229, L. R. A. 1918 F, 463;*Carlton v. Boudar,* 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480; *Georgia L. Ins Co. v. Easter,* 189 Ala. 472, 66 South. 514, L. R. A. 1915C, 456; *Casualty Co. v. Joiner,* (Tex. Civ. App.) 178 S. W. 806; *Lemon v. Chanslor,* 68 Mo. 341, 30 Am. Rep. 799; *Lewark v. Parkinson,* 73 Kan. 553, 85 Pac. 601, 5 L. R. A. (N. S.) 1069; *Jackson Architectural Iron Works v. Hurlbut,* 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432. *Parmalee v. Lowitz,* 74 Ill. 116, 24 Am. Rep. 276; *Donnelly v. Phila. & R. R. Co.,* 53 Pa. Super. Ct. 78, 82; *Van Hoeffen v. Taxicab Co.,* 179 Mo. App. 591, 599, 600m 162, S. W. 694; *Primrose v. Casualty Co.,* 232 Pa. 210, 81 Atl. 212, 37 L. R. A. (N. S.) 618, 622, 623; *Huddy on Automobiles* (6th Ed.) p. 152,-131; 2 *Moore on Carriers,* 944."

Anderson v. Fidelity & Casualty Co., 228 N. Y. 475; 127 N. E. 584.

This is another case exactly similar to ours in that it is a suit against an insurance company to enforce the double indemnity clause where the injury occurred to the insured while on a public conveyance operated by a common carrier. The Court holds that a taxicab is a common carrier. Among other things the Court says:

> 'Does not the term 'common carrier' have a different significance than the narrow definition given by Moore, to the layman who negotiates an insurance contract, by which he is to be paid a special sum provided his injury takes place while traveling in a public conveyance provided by a common carrier? The insurance contract certainly meant something, and its meaning was not limited by the old definition of 'common carrier'. Its indemnity was for personal injuries. Did not 'common carrier' include in the mind of the insured and in the mind of the ordinary man, a street car, busses, jitneys, taxicabs, and all means of conveyance which are publicly offered to travelers whether accompanied by their luggage or not, regardless of whether the offer is made by a carrier of goods and persons or merely of persons?
>
> The certificate of incorporation of the company owning the taxicab in question states that it is organized for the transportation of passengers or goods. Why, then, is it not a 'common carrier' within the meaning of the insurance policy in the instant case? That the company itself was a common carrier within the meaning of the policy, there can be, I think, little doubt.
>
> The tendency of the law is to eliminate distinctions which no longer continue in the mind

of the ordinary man. The Supreme Court of the United States well says in *Little v. Hackett,* 116 U. S. 366, 379, 6 Sup. Ct. 391, 397 (29 L. Ed. 652), Field, J.:

'There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive.'"

Dunn. v. New Amsterdam Casualty Co., 126 N. Y. S. 229;

Action upon an insurance policy for injuries sustained while assured was—

"actually riding as a passenger in a place regularly provided for the transportation of passengers, within a surface or elevated railroad car, steamboat or other public conveyance provided by a common carrier for passenger service only."

This was a suit arising out of the "General Slocum" disaster. This vessel was chartered by a Church Society for a picnic for a lump sum. Held:

"The steamboat company is a common carrier. True this steamboat was specially chartered by an excursion party; but it was regularly provided for the transportation of passengers. It was not a freight boat and it was regularly in the business of taking similar parties to either of the two specified pleasure resorts."

Berliner v. Travelers Insurance Co., 212 Cal. 458;

Action upon a policy insuring the husband of the plaintiff against death by accident. The policy pro-

vided that if the injuries resulting in death were received while riding as a passenger in any passenger conveyance using steam cable or electricity as a motive power the amount to be paid would be double the amount set forth in the policy. At the time of receiving the injuries, decedent was riding temporarily upon the locomotive of a train, which was wrecked. Defendant sought to evade liability upon the ground that the contract of insurance did not provide for the death of the party by an accident while riding on the locomotive, but only in a conveyance intended for passengers.

In answering this argument the Court says:

> "The policy here in question, though a preferred class, was not special, covering only accidents to the insured while engaged in a designated employment, pursuit, occupation, or situation, but covered any possible accident which might happen to any one under any or all circumstances, provided it did not fall within an exception expressed in the policy.
>
> The term 'conveyance" applies as well to the means of transporting freight as of passengers, and in the clause exempting the insurance company from liability for accidents occurring in 'entering or trying to enter or leave a moving conveyance using steam as a motive power' is so applied; while the clause hereunder consideration distinguishes a 'conveyance provided for the transportation of passengers' from those used for the transportation of freight. Neither clause specified railroad trains, and each includes as clearly vessels propelled by steam. If the insured had met with an accident upon a passenger steamer instead of a railroad train, upon what part of the vessel must he have been

> at the time of the accident to be within the protection of his policy? Must he be seated in the cabin, or occupy a stateroom? The policy does not say so. It restricts him to no part of the vessel, and therefore if the insurance company sought to escape liability by showing that at the time of the accident he was not in the cabin or a stateroom, it must import into the contract a qualification or provision which is not expressed or even implied."

The Court also holds that policies of insurance are to be liberally construed in favor of the insured, and where its terms permit of more than one construction that will be adopted which supports its validity.

> "That the locomotive is part of the 'conveyance' provided for the transportation of passengers upon a railroad is not disputed. * * * If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used."

The Court quotes the following from *Equitable etc. Ins. Co. v. Osborn,* 90 Ala. 201:

> "Exceptions of this kind are construed most strongly against the insurer. and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies. rendered necessary. especially in modern times. to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy."

So in the case at bar when must the deceased have got on board the motor-bus in order to hold the in-

surance company on its policy for which it has been fully paid? If she got on at 3:30 o'clock in the afternoon Ward was a common carrier, but at 3:31 o'clock he was not according to its argument. Just as in the Berliner case it was absurd to say that the company is liable if the deceased boarded one part of the train and not liable if on another part of it, so here it is equally ridiculous to say that the company is not liable when the carrier is summoned by telephone though they are liable if summoned by voice at the railroad station.

Is this not an instance of "the ingenuity of Insurance Companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy"?

V.

THE RULINGS OF THE TRIAL COURT UPON QUESTIONS OF EVIDENCE EXCEPTED TO WERE ERRONEOUS.

The assignments of error as to the rulings of the trial court are all relative to the one question of fact as to whether or not Ward was a common carrier. Such evidence on the part of the plaintiff was offered with reference to the general understanding of the witnesses gained from personal conversation with Ward and common repute.

We submit that such testimony while it may be hearsay to some extent yet that is the only possible way to prove such a fact. All knowledge of that sort is necessarily the result of contact with others.

The objections made by plaintiff to questions on cross-examination by defendant were for the sole purpose of excluding extraneous facts as to other matters. Certain of the questions to the witness Ward were obviously calling for a conslusion of law and should have been ruled out.

We respectfully ask, therefore, that the order of the trial Court directing a verdict for the defendant be reversed and a new trial granted.

Dated, San Francisco,
March 9, 1925.

Respectfully submitted,

WALLACE & AMES,
Attorneys for Appellant.

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No. 4449

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD CHENERY, as administrator with the will annexed of the estate of Edith P. Chenery, deceased,

Plaintiff in Error,

vs.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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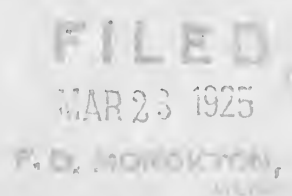

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

The facts in this case are not disputed and there is no conflict in the testimony. No evidence was offered on behalf of the defendant and the motion for a directed verdict was argued upon undisputed facts presented by the plaintiff. Our opponent's brief contains most of the salient features in the case but in order to simplify the argument we will restate the facts, supplying several features which have been omitted from the brief of the plaintiff in error.

Leonard Chenery, the plaintiff below, took out a policy of accident insurance in the defendant cor-

poration, paying an annual premium of twenty-five ($25.00) dollars for a policy providing for the payment of the principal sum of seventy-five hundred dollars ($7500.00) in the event of his death by accident and a weekly indemnity in case Chenery sustained a not fatal injury. The policy contained the customary provisions and benefits of accident insurance policies and was made payable to his wife, Edith Chenery, in the event of Chenery's death by accident.

In addition to the insurance of Chenery, the policy also gave a limited amount of accident insurance to the beneficiary. The insurance of the beneficiary is provided for in Section "H" of the policy (transcript pages 72-73). In substance the beneficiary endorsement provided for the insurance of Mrs. Chenery against bodily injuries sustained by accidental means "while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service" (transcript page 72).

Mrs. Chenery, the beneficiary in the policy, met her death in an automobile accident, and the only question involved is whether the automobile in which she was riding at the time was a "public conveyance * * * provided by a common carrier for passenger service".

The accident occurred in New Zealand where Mrs. Chenery had gone to visit her sister who lived on a large farm nine miles from Clevedon which was the nearest town. Mrs. Chenery and several others had

been on this farm and they left the farm on the day of the accident intending to return to Aukland which was a number of miles away. The journey could have been made in a motor boat by water but the launch was not available (transcript page 51) and the party decided to return to Aukland overland. The proposed trip was as follows:

To go from the farm to the nearest point on the highway—a distance of about three miles—by means of a cart or wagon driven by a native (transcript page 47). There was no regular means of transportation along the highway at that point so Mrs. Chenery, or some other member of the party, telephoned to the town of Clevedon which was nine miles from the farm and six miles from the point on the highway where the cart road intersected the highway; in Clevedon a man named Ward kept a garage and rented out automobiles, and by telephone they requested him to send out an automobile on the main highway and meet the cart or wagon at a point six miles east of Clevedon (transcript pages 38, 43). The party intended to take Ward's automobile on the highway and travel in it through Clevedon and then on to Papakura which was some ten miles beyond Clevedon. At Papakura they intended to take the train at 7:30 that night for Aukland. Ward was accustomed to run three busses a day between Papakura and Clevedon but he did not have any regular service to the east of Clevedon and only sent automobiles in that direction on receiving special calls (transcript page 39). Ward's

regular service between Clevedon and Papakura had been completed for the day. His regular runs between Clevedon and Papakura were three a day, the last automobile leaving at 3:30 in the afternoon and on the day of the accident all three of the automobiles had left on their usual schedule time. Consequently, the accident did not occur on one of his regular runs, but on this special trip, two hours after the last regular run for the day had been completed (transcript pages 40, 42, 43).

When Ward received the telephone call, he drove an automobile out along the main highway and met the cart or wagon coming from the farm (transcript page 34). Mrs. Chenery and the rest of the party dismounted from the wagon and entered Ward's Ford automobile and drove to Clevedon which was six miles away. The accommodations for the party in the Ford were so inadequate that upon reaching Clevedon Ward transferred them to a Dodge car that he owned (transcript page 35) and then started for Papakura where the party expected to take the train for Aukland that night. On this part of the trip, the automobile turned over the side of a bank and into a river and Mrs. Chenery was drowned.

It is our contention that she did not meet her death while a passenger on a public conveyance provided by a common carrier for passenger service as required by the policy. Conceding for the purposes of this argument that the operation of Ward's regular service between Papakura and Clevedon three times a day was that of a common carrier, it

is to be noted that this accident did not occur upon one of his regular runs but upon a special trip beginning six miles away from his regular run (transcript page 39) and occurred two hours after his last run for the day had been completed (transcript pages 40, 42, 43).

The testimony shows without conflict that as a part of Ward's business he was accustomed to give special service by special arrangement as in the case at bar just as livery stable keepers rented out carriages with drivers. Ward testified that it was pursuant to this branch of his business that he received the order and accepted the party for transportation to Papakura (transcript pages 44-45). In that behalf, Ward testified in substance as follows:

> "That it was his practise at the time of the accident to hire out cars for private use with drivers as part of his regular business and that it was pursuant to that branch of his business that arrangements were made to take Mrs. Chenery and party to Papakura (transcript pages 44-45). * * * This was a special trip and the charge was one pound fifteen shillings (transcript page 35). A special charge was made from Whakatiri (where the journey began) and a special fare ruled after the usual run from Clevedon to Papakura (transcript pages 35-6). This was not on the regular run (transcript page 38). It began six miles away from the regular run (transcript page 38). * * * He had no regular run of automobiles on the road where he picked the party up (transcript page 39). * * * The three regular trips from Clevedon to Papakura were at 7 a. m., 8:30 a. m. and 3:30 p. m. The last regular run on the day of the accident was 3:30 p. m. Mrs.

> Chenery's party left at half past five in the afternoon (transcript page 40). He hired out automobiles privately in addition to the automobiles used on the regular run from Clevedon to Papakura (transcript page 41). He had automobiles at his garage to hire out privately in addition to automobiles used on the regular run (transcript page 41). A person could engage an automobile privately for transportation from Clevedon to Papakura (transcript page 42). The last regular run for the day was at 3:30 p. m. (transcript page 42). If the automobile involved in the accident had not been specially hired for the service, no automobile would have been sent from Clevedon to Papakura after 3:30 in the afternoon on the day of the accident (transcript page 43). He made the arrangements for the service by telephone (transcript page 43). All three of the regularly scheduled runs had left on the day of the accident before Mrs. Chenery left Clevedon. * * * It was his practise to hire out cars for private use with drivers as part of his regular business (transcript pages 44-45). It was pursuant to that branch of the business that arrangements were made to take Mrs. Chenery and party from the farm to Papakura (transcript page 45.

The trial court held that under these circumstances plaintiff was not entitled to recover, and this ruling, we submit, was clearly correct, and hence, that the judgment should be affirmed.

Argument.

I.

THE CONVEYANCE INVOLVED IN THE ACCIDENT WAS NOT A "PUBLIC CONVEYANCE PROVIDED BY A COMMON CARRIER FOR PASSENGER SERVICE". THE CASE IS IDENTICAL TO THE HIRING OF A CARRIAGE FROM A LIVERY STABLE KEEPER. WARD, THE DRIVER OF THE AUTOMOBILE, WAS ACTING AS A PRIVATE CARRIER AT THE TIME OF THE ACCIDENT.

The testimony in the case is undisputed. It shows that Ward had a daily service between Clevedon and Papakura, three times a day, and the last run starting at 3:30 in the afternoon. On the day of the accident all three runs had been completed, and assuming that Ward acted as a common carrier on the three regular runs, his obligations in that behalf were over on the day of the accident. He received the call to transport the Chenery party starting at a point that was six miles off from his regular run and he sent out an automobile specially for this particular service and for an agreed consideration of one pound and fifteen shillings (transcript page 35). As he testified, he was accustomed to accept special employment aside from the regular service that he operated between Papakura and Clevedon; and if the automobile involved in the accident had not been specially hired, no automobile would have been sent out to the farm, nor from Clevedon to Papakura after 3:30 in the afternoon (transcript page 43). Therefore, assuming that in making the three regular runs he operated as a common carrier, nevertheless in accepting the employment for spe-

cial trips Ward operated as a *private* carrier. As a common carrier upon his three regular runs, of course he was obliged to accept whoever applied and for a reasonable compensation uniformly charged to all passengers. But there was no obligation on his part to accept this special employment six miles off from his regular run and two hours after his last automobile had left. Judge Bourquin pointed out that this was determinative of the issue (transcript pages 57-64). As Ward was not obliged to accept a special employment off of his regular run and after his scheduled time, it follows that in accepting the Chenery party he was not acting as a common carrier but as a private one. A private carrier is at liberty to reject an offered service while a common carrier may not do so.

> "The distinction between a public or common carrier of passengers and a special or private carrier of the same is that it is the duty of the former to receive all who apply for passage so long as there is room and no legal excuse for refusing while such duty does not rest upon the latter."

10 *C. J.* 607.

The issues involved in this case have been authoritatively settled by a decision of the Supreme Court in the case of

Terminal Taxicab Co. v. Kutz, 241 U. S. 252; 60 L. Ed. 984.

In that case it became necessary to determine whether a taxicab company operating in Washing-

ton, D. C., was a common carrier. It appeared that the taxicab company operated taxicabs from the Union Railway depot to the hotels and from the hotels to the depot. It also had a central garage where upon receipt of individual orders, generally by telephone, it would send out automobiles to furnish the requested service. The court held that in the first branch of the business, that is in operating between hotels and railway station, the Company was a common carrier; but it held that it was not a common carrier in furnishing service to persons telephoning to the garage. The latter service was likened to the old-fashioned service of a livery stable keeper which of course was not that of a common carrier. The court said:

> "The rest of the plaintiff's business, amounting to four-tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service, and no doubt would do so if the pay was uncertain, but it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price, probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the station and hotels. There is no contract with a third person to serve the public generally. * * * The court is of the opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is

> passed. But, however, it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. * * * In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

Accordingly, it was held that in the second branch of its business the taxicab company was not acting as a common carrier and was not subject to the jurisdiction of the Public Utility Commission of the City of Washington. So in the case at bar, even though Ward was a common carrier in the branch of his service covering the three regular runs between the towns of Papakura and Clevedon, in the other branch of his business where he sent out automobiles on special orders he was a private carrier. The decision of the Supreme Court is decisive of the issue.

While the *Terminal Taxicab* case did not involve any question of insurance, the principle involved controls the case at bar for the issue involved in this case is whether Ward was acting as a private carrier or a common carrier at the time of the accident. Applying the decision in the Supreme Court case, it necessarily must be held that Ward was operating as a private carrier.

The principle involved in the Supreme Court case has been applied to insurance cases identical to the one now before the court. In the case of

Georgia Life Insurance Co. v. Easter, 66 Southern 514 (Alabama),

the Harris Transfer & Warehouse Company was concededly a common carrier of both freight and passengers, but sometimes it accepted employment in hiring out its conveyances for special services, and on one occasion accepted employment to take out a party to a picnic in one of its wagons. The plaintiff in that case was injured on the trip and made a claim against the insurance company by virtue of a provision in his policy giving him double indemnity in case the accident occurred on a public conveyance provided by a common carrier. The court held that although generally the transfer company acted as a common carrier, in this particular case it had accepted a special employment and was operating as a private carrier. The court said:

> "The mere fact that a livery stable man may be engaged in one line of business as a common carrier does not render him a common carrier as to his livery business. His hack in hauling passengers from a station may be a common carrier and that same hack when it was carrying a traveling man from one town to another may not be a common carrier. In the one instance the passenger has a legal right to passage. In the other instance the traveler has no legal right to make such demand. In this case, under the law, the facts show that in the particular business in which this Transfer Company was engaged when the plaintiff's intestate

> was killed, it was not a common carrier, but only a private carrier for hire."

That case points out very significantly that the same conveyance may be employed in one branch of the service on common carriage and in another branch of the same person's service on private carriage. The court also stressed the feature that Judge Bourquin emphasized in deciding the case at bar, namely, that when a carrier has the right to refuse an order he is not acting as a common carrier but as a private one.

The decision of the Supreme Court in the *Terminal Taxicab* case (supra) was cited in the briefs and followed in a decision of the Pennsylvania Court in the case of

> *Oppenheimer v. Maryland Casualty Co.,* 70 Pa. Sup. 382.

In that case the point involved was similar to the one in the case at bar and the court held that the policy holder could not collect double indemnity when injured on an automobile specially employed for a trip from Wilkes-Barre to Scranton. All of the seven judges that heard the case on appeal concurred in the decision. The court stated that the situation was identical to that of a livery stable keeper who was at liberty to accept or reject employment as he wished. The court said:

> "Neither in form nor in substance can we see that such contract differed in any material way from a similar one made with a livery

> stable keeper for the use of a carriage and team of horses."

The Supreme Court of Tennessee reached the same conclusion in the case of

> *Darnell v. Fidelity & Casualty Insurance Company,* Tennessee Supreme Court 1915; 46 Insurance Law Journal, 523; referred to in 9 American Law Reports 1557.

We have been unable to locate the official report of this case as the decision was apparently an oral one and never transcribed. In the above citation from the Insurance Law Journal the statement of the case is given based upon a certified copy of the record. It appears that on a special telephone call to the garage of a taxicab company, a taxicab was sent to a private residence for the purpose of taking four passengers from the residence to the railroad station. The insured was a member of the party and was killed in an accident occurring on the trip. Claim was made against the insurance company upon the ground that the deceased had met her death on a public conveyance provided by a common carrier. The lower court gave judgment for the plaintiff but on appeal the decision was reversed and judgment ordered for the insurance company. It appears from the record in the case that the decision of the Supreme Court in the *Terminal Taxicab* case (supra) was cited and apparently followed.

In the case of

Rathbun v. Ocean Accident & Guaranty Corporation, 132 Northeastern 754 (Ill.).

the court pointed out the distinction existing between a person operating automobiles as a common carrier and one operating them under special contracts as a private carrier. In that case the insurance policy provided for double indemnity for injuries occurring "on a public conveyance provided by a common carrier for passenger service". The insured (a physician) had hired an automobile from a public garage for use in making calls upon his patients and the driver of the automobile was on the seat with him although the assured was driving at the time. The court followed the decision of the Supreme Court in the *Terminal Taxicab* case and held that this was private carriage.

The court said:

> "This question does not necessarily depend on the fact whether or not Rayle Brothers were common carriers in the City of Danville in carrying persons from hotels to trains or from trains to hotels or from place to place within the city limits. While it is not stated in so many words, the clear inference in the record is that the service rendered to Dr. Rathbun was by special contract, and that the service differed in no material way from the character of service ordinarily rendered by livery men in letting teams and carriages to their patrons for trips into the country or from town to town. * * * Livery stable keepers lack one of the essential qualifications * * * a readiness to carry any and all persons who apply. * * * The fact

> that Rayle Brothers were licensed in Danville to run taxicabs, if such be the case, can have nothing to do in determining the question of whether or not they were common carriers in rendering the service in question."

Under certain circumstances, taxicabs are public conveyances and their operators are common carriers. But when the arrangements are private and the contracts are special, the situation is analogous to that of a livery stable keeper who lets out his teams either with or without drivers. He is a private carrier for hire but not a common carrier. See in this behalf

Forbes v. Reiman, 166 Southwestern 563.

In the seventh edition of *Huddy on Automobiles,* page 132, Section 139, the author refers to numerous authorities holding that the business of a garage man furnishing automobiles from his place of business on specific orders of customers is different from the general taxi or jitney business. The former is not deemed the business of a common carrier.

The case is analogous to that of a livery stable keeper who operates as a private carrier. He is not a common carrier. See 10 *C. J.* 608.

The fact that Ward may have been a common carrier in one branch of his business did not preclude him from acting as a private carrier as well. For example, in the case of

Georgia Life Insurance Co. v. Easter (supra),

the court stated that

> "the mere fact that a livery man may be engaged in one line of business as a common carrier does not render him a common carrier as to his livery business. His hack when carrying passengers from the station may be a common carrier, and that same hack when it is carrying a travelling man from one town to another may not be a common carrier. In one instance the passenger has a legal right to demand passage. In the other instance the travelling man has no legal right to make such demand."

Applying the last quotation to the case at bar, it becomes apparent that Ward was acting as a private carrier. The day was a stormy one; Ward had no machines operating in the direction of the farm; his last regular run to Clevedon had been completed. It was optional with him whether he should send out an automobile six miles off of his regular run and at that hour of the day and transport the party from the farm to Papakura. Most assuredly he could have refused, but when he accepted he did so by special contract and in that branch of his business in which he hired out cars with drivers for private use (see transcript pages 41, 42, 43, 44, 45).

The *Terminal Taxicab* case was referred to by Judge Cushman in the case of

> *Puget Sound International Railway v. Kuykendall*, 293 Fed. 791 at page 796,

where the court said:

> "'That a company furnishing from its garage automobiles for service on order, gener-

> ally by telephone, was free to refuse the employment, and was as to such service a private carrier." (Citing Terminal Taxicab Co. v. Kutz, 241 U. S. 252.)

There is nothing to prevent a common carrier from making a special contract pursuant to which he acts as a private carrier. It was so held by the Supreme Court in the case of

Santa Fe & Central Railway v. Grant Brothers, 228 U. S. 177; 58 L. Ed. 787.

A common carrier may act as private carrier as a matter of accommodation or by special arrangement, 4 R. C. L. 550; but in acting as a private carrier the obligations differ from those of a common carrier; 4 R. C. L. 549.

Reviewing the facts briefly, we find the following:

The elements of a common carrier were lacking; Ward accepted a special contract and was not operating by virtue of regular service established for the public. He accepted an employment six miles off of his regular run and two hours after his last regular run for the day was completed. He accepted the employment in his capacity as a private carrier and could have refused to do so had he wished. The entire arrangement was a special one—one of private carriage and consequently Mrs. Chenery did not meet her death while being transported in a public conveyance provided by a common carrier for passenger service.

II.

NO JURY QUESTION WAS INVOLVED IN THE CASE AT BAR.

The brief of the plaintiff in error contains an abundant citation of authorities in support of the elementary principle that when evidence is conflicting the case should be sent to the jury. There is no dispute upon that proposition and the citation of authorities needless. Upon the other hand, it is equally well established that when there is no substantial evidence to sustain plaintiff's case, the court should direct a verdict for the defendant.

38 *Cyc.* pages 1533-1536.

The editors state:

> " * * * It is held that if there is no evidence in the case from which the jury can properly find in favor of a party upon whom rests the burden of proof, or if there is no more than a mere scintilla of evidence, or where the evidence is free from conflict and admits of but one conclusion, the Court should withdraw the case from the jury. So it has been very generally held that if the facts are admitted, or only one inference can reasonably be deduced therefrom * * * the Court should withdraw the case from the jury. * * * Where the sole question is one of law, it is proper for the Judge to discharge the jury and decide the case."

All these statements are supported by abundant authority.

In the *Estate of Sharon,* 179 Cal. 447, the court said, pages 459-60:

> "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. There are numerous decisions to this effect (citing cases).
>
> "Many other cases supporting the rule are cited in the Baldwin case. This rule would sustain the action of the court below even if it were conceded that there was some conflict in the evidence relating to the jurisdictional facts essential to a valid adoption. The conflict, if any, was beyond question not substantial, but was a mere shadow of form without substance. The objection that the court had not the power is consequently without merit."

In view of the familiarity of the court with these principles, we will not cite additional authorities in support of these propositions. In the case at bar, there was no conflict in the testimony. The facts were not in dispute. It was purely a question of law whether on the undisputed evidence Ward was or was not a common carrier in driving the automobile at the time of the accident. The testimony showed without conflict that he was driving pursuant to the branch of his business where he made special contracts on special occasions for private carriage. Consequently, there is no occasion to comment upon the cases cited on Divisions II and III

of our opponent's brief regarding the question of procedure.

III.

THE CASES CITED IN DIVISION IV OF OUR OPPONENT'S BRIEF DO NOT MEET THE ISSUE.

The first dozen cases cited in Division IV of plaintiff's brief do not meet the situation. They contain definitions of common carriers and a discussion of the relation of taxicabs and motor busses to the status of common carrier. It is not disputed that taxicabs are frequently operated as common carriers. But as the Supreme Court pointed out in the *Terminal Taxicab Co.* case (supra), a taxicab may be furnished for private carriage as well as for common carriage. Our opponents have entirely overlooked the distinction pointed out by Justice Holmes in that case. And in deciding the case at bar, Judge Bourquin did not question the fact that a taxicab owner might be a common carrier on certain occasions. But following the decision of the Supreme Court, he held that the undisputed evidence in the case at bar showed that the Dodge automobile at the time of the accident was being operated by Ward in his capacity as a private carrier, although in another branch of his business he had a regular run between Clevedon and Papakura and was doubtless a common carrier.

Several insurance cases have been cited in this division of plaintiff's brief in support of his con-

tention but an examination of these cases shows that in the main they do not support his contention or are in conflict with the decision of the United States Supreme Court. Plaintiff has cited the *Primrose* case on page 24 of his brief as the case he chiefly relies upon. But the policy in that case differed radically from the one in the case at bar. In the cited case, the policy provided for recovery in case of injury on a "public conveyance for passenger service propelled by gasoline". Of course, that is radically different from the case at bar. In the case at bar, the conveyance must be provided by a common carrier whereas in the cited case the words "common carrier" are not used. It is merely provided in the cited case that the conveyance must be a public one "propelled by gasoline". Furthermore, the *Primrose* case is in conflict with the later Pennsylvania decision in *Oppenheimer v. Maryland Casualty Co.,* 70 Pa. Sup. 382. The *Primrose* case was decided before the decision of the Supreme Court in the *Terminal Taxicab* case and it has subsequently been criticised in other cases as being too broad in the language used. In the case of *Anderson v. Fidelity Casualty Co.,* 127 Northeastern 584, the court stated that "it may be that the (Primrose) decision was too broad in that it applied to rented automobiles under contract for a day or an hour or other specified time" and in the concurring opinion of Judge Hiscock he pointed out that the taxicab involved in the *Primrose* case was probably a "cruiser" and common carrier and

not one hired from a garage under special contract. But, as we indicated above, in the *Primrose* case the question of common carrier was really not involved at all.

The next case cited by the plaintiff is *Fidelity & Casualty Co. v. Joiner* (brief page 26), a decision of the Texas Court of Appeals. That decision is out of line with all other authorities on the principles involved. In substance, it holds that a livery stable keeper is a common carrier. In that behalf the case stands alone for it is elsewhere held without conflict that such is not his status. See 10 *C. J.* 608 where the editors state:

> "A livery stable keeper does not hold himself out to serve any and all persons; but operates only under a special contract, and deals with such persons only as he chooses, and is in no sense a common carrier."

The case was decided before the decision of the Supreme Court in the *Terminal Taxicab* case. We respectfully submit that when analyzed it cannot be regarded as an authority in support of any of plaintiff's contentions in the case at bar.

The next case cited by our opponent is *Anderson v. Yellow Cab Co.* (brief page 27); but that is not an insurance case and merely holds that under certain circumstances the operator of a taxicab may be a common carrier. The court expressed an unwillingness to follow the decision of the Supreme Court in the *Terminal Taxicab* case and conse-

quently if there is any conflict the decision of the United States Supreme Court controls here. But even in the cited case, it is conceded that a taxicab company may make a bargain for private carriage. The real point of the case seems to involve the degree of care required of the taxicab operator, and the court held the defendant to the highest degree of care "whether in a strictly technical sense defendant can be regarded as a common carrier of passengers or not."

The next case cited by plaintiff is *Anderson v. Fidelity & Casualty Co.* (brief page 29). But in that case, concededly the taxi driver was operating as a common carrier. As we pointed out above, the court in this case did not undertake to hold that every taxicab operator was to be regarded as a common carrier and specifically stated that the language of the *Primrose* case was too broad. We particularly refer in that behalf to the concurring opinion of Chief Justice Hiscock who makes the same distinction between taxis operating as private carriers and those operated as common carriers that was made by the Supreme Court in the *Terminal Taxicab* case.

The *Dunn* case, cited on page 30 of plaintiff's brief was concededly a common carrier case—a steamboat regularly plying between "two specified pleasure resorts".

The *Berliner* case cited on page 30 of plaintiff's brief is not analagous in any particular to the case

at bar. The only question involved there was whether a policy holder was riding as a passenger when at the time of the injury he was in the locomotive at the invitation of the superintendent of the railway. The case is quite beside the mark.

In the latter portion of subdivision IV of plaintiff's brief, counsel have evidently confused the issues in the case at bar with those involved in other cases. There is no question of policy construction involved here. The language is clear and free from all doubt as to its meaning. Nor is it a case of "exceptions" which "devour the whole policy". On the contrary, the beneficiary endorsement is the insuring clause. It gives a limited form of insurance to the beneficiary which is "thrown in" by insurance companies in addition to the main insurance. If the beneficiary qualifies under the beneficiary endorsement, the insurance attaches; otherwise it does not. But this is not a case of an "exception" limiting other and broader insurance.

It is stated in plaintiff's brief that Ward was carrying a newspaper and a loaf of bread on the trip. We are at a loss to understand why this is adverted to for it has no bearing on the case, for even if the automobile involved in the accident was being used as a common carrier of freight, the plaintiff could not recover as the policy allows recovery only in case of injury upon a conveyance "provided by a common carrier *for passenger service*" (Transcript page 72).

In Subdivision II of plaintiff's brief, the statement is made that Ward never "asserted the right to refuse the service". But that is quite immaterial. A private carrier may consistently accept every offered employment so long as he has the facilities, but this does not make him a common carrier for he still has the right to refuse if he wishes to do so. In that behalf in the *Terminal Taxicab Co.* case (supra) the taxicab company was held to be a private carrier in one branch of its business in spite of the fact that "it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer"; the court said:

> "still the bargains are individual * * *. There is no contract with a third person to serve the public generally. * * * There seems to be no difference between plaintiff's service from its garage and that of a livery stable. A private shopkeeper may serve every customer that wishes to buy his wares, yet he is not obligated to do so and may at any time and for any reason refuse a prospective customer."

IV.

THE RULINGS ON QUESTIONS OF EVIDENCE WERE CORRECT.

At the end of the brief it is suggested, rather timidly, that the court ruled erroneously on certain questions of evidence. But such is not the case. The court refused to admit testimony calling for the legal conclusions of the witnesses, and also re-

fused to admit hearsay testimony—conversations between Ward and third persons in the absence of the defendant or its agents. The questions were also leading.

Plaintiff also objected to certain questions propounded by the defendant upon *cross-examination* of witnesses called by plaintiff. Counsel overlooks the fact that the witnesses were called by him and that defendant was entitled to the latitude allowed by the court on cross-examination.

In Conclusion.

There was only one issue involved in the case at bar and that is whether at the time of the accident Ward was operating the Dodge car as a common carrier. The evidence is clear and undisputed. He was not accustomed to operate automobiles out toward the farm except on special employment, nor wtihout special contract did he operate any automobiles after 3:30 in the afternoon. This was at 5:30 and after his last regular run for the day was over; it was a special contract to convey a party from a point six miles off of his regular run to Papakura and after his regular runs for the day were over. It was a part of his business to accept special calls for transportation at special rates and pursuant to arrangements specially made in that behalf. This is private, not common carriage, and it was in his capacity as a private carrier that Ward accepted the

employment. There was nothing for the jury to pass on—the facts were undisputed and if a verdict had been returned for the plaintiff it would have been necessary for the trial court to set it aside. For these reasons, we submit that the judgment should be affirmed.

Dated, San Francisco,
March 20, 1925.

Respectfully submitted,
REDMAN & ALEXANDER,
Attorneys for Defendant in Error.

No. 4451

15

United States Circuit Court of Appeals

For the Ninth Circuit.

E. H. BARBER, United States Naval Disbursing Officer,

Appellant,

vs.

WILLIAM BRAWNER HETFIELD,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
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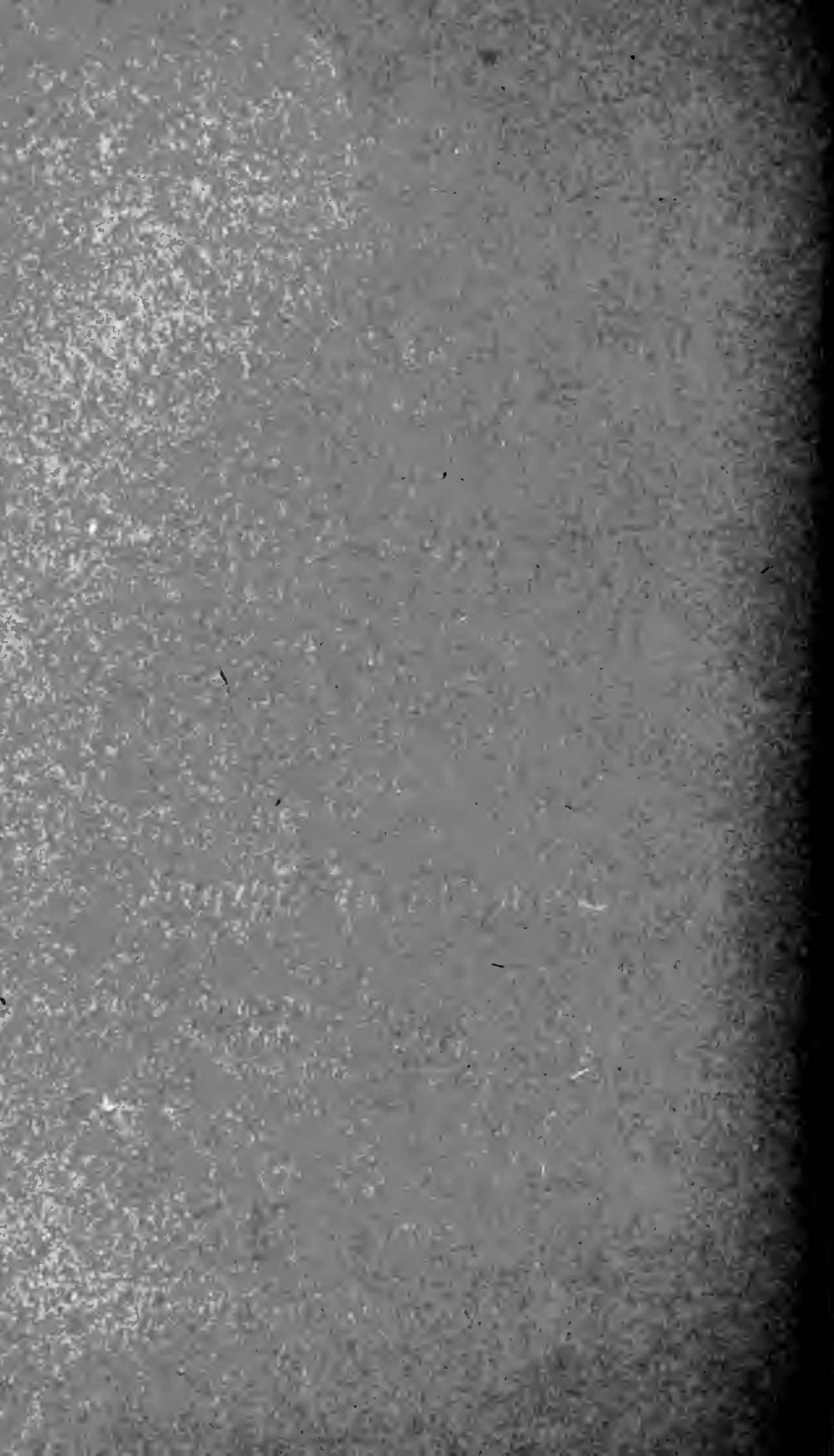

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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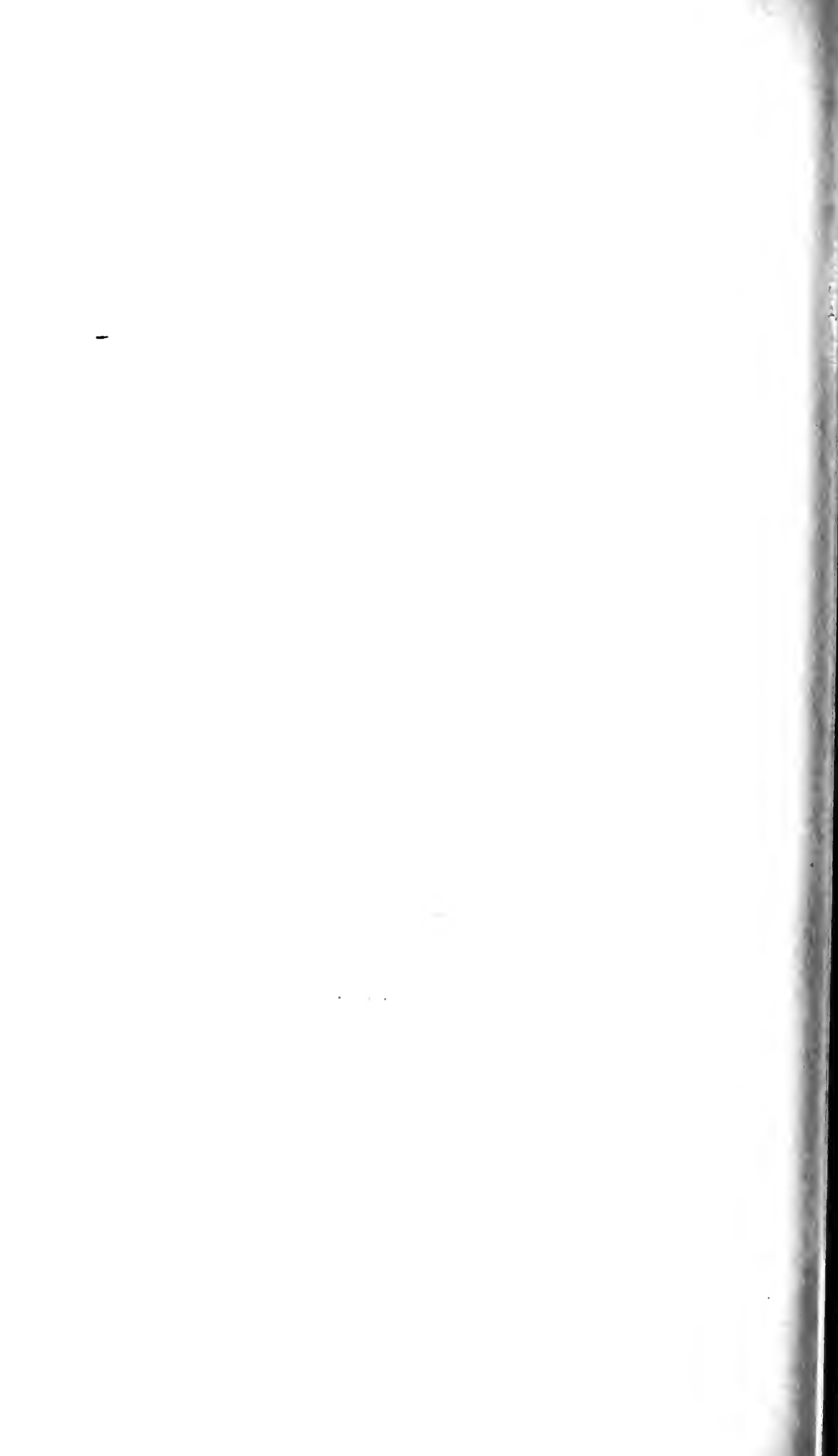

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD,
Petitioner,
vs.
E. H. BARBER, United States Naval Disbursing Officer,
Respondent.

No. I-13-M Equity
CITATION

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES TO WILLIAM BRAWNER HETFIELD,

GREETING:

TO WILLIAM BRAWNER HETFIELD:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, within thirty days from the service of this Citation, pursuant to an Appeal duly allowed by the District Court of the United States in and for the Southern District of California and filed in the Clerk's Office of said Court on the 12th day of December, 1924, in a cause numbered I-13-M Equity, wherein E. H. BARBER is appellant and you, appellee, to show cause, if any, why the order rendered against the said appellant as in said Appeal mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable Paul J. McCormick, Judge of the District Court of the United States in and for the Southern District of California, this 12th day of December, 1924, and of the Independence of the United States the One-hundred forty-ninth.

Paul J. McCormick

United States District Judge

SERVICE OF THE WITHIN CITATION and receipt of a copy is hereby admitted this 12th day of December, 1924.

(ENDORSED):

No. I-13-M Equity IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California Southern Division WILLIAM BRAWNER HETFIELD Petitioner vs. E. H. BARBER, United States Naval Disbursing Officer, Respondent CITATION FILED DEC 12, 1924 CHAS. N. WILLIAMS, Clerk By L. J. Cordes, Deputy Clerk.

Moore and Farraher

Attorney for Appellee

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD, Petitioner, -vs- E. H. BARBER, United States Naval Disbursing Officer, Respondent.	PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

The petition of William Brawner Hetfield respectfully shows:

I.

That petitioner is now and at all times herein mentioned was a citizen of the United States and a resident of this Judicial District, and a duly commissioned and acting Lieutenant Commander of the United States Navy.

II.

That E. H. Barber is the Disbursing Officer of the United States Navy for the Eleventh Naval District, which includes the City and County of Los Angeles, California, with his office at San Diego, California.

III.

That as such officer of the United States Navy, petitioner is entitled to receive as pay or salary, inde-

pendent of any claims for dependency of relatives, the monthly sum of Three Hundred Sixty-five Dollars and Seventy-five cents ($365.75).

IV.

That on May 22, 1924, petitioner was informed in writing by the Comptroller General, through his Solicitor, that on March 17, 1924, it had been found that petitioner had erroneously been paid the sum of Two Thousand Eight Hundred and Seventy Dollars and Seventy-one cents ($2870.71), for what was termed "alleged dependency by you (petitioner) of your (petitioner's) mother for a period from April 22, 1919 to March 31, 1922," and said communication contained a demand upon petitioner for the payment of said sum to the United States government; that petitioner refused to pay said sum on the ground that the dependency allowances referred to in said communication had been applied for in good faith by petitioner and been approved by the proper accounting officers and properly paid to petitioner.

V.

That thereafter said E. H. Barber, Disbursing Officer, refused to pay to petitioner any portion of his pay or compensation as Naval Officer, and has refused to pay the dependency allowance for which petitioner filed affidavits in proper form.

VI.

That said Disbursing Officer gave as his reason for refusing to pay petitioner his compensation fixed by the United States Statute, that petitioner was indebted to the United States in the amount of Two Thousand

Eight Hundred and Seventy Dollars and Seventy-one cents ($2870.71), and that no money is to be paid to petitioner on account of his compensation as such Naval Officer until he had either paid the said amount, or the compensation withheld had offset said amount. That said condition continued until the 15th day of August, 1924, when said Disbursing Officer paid eighty (80%) per cent of the compensation earned by petitioner, as fixed by the United States Statutes, from April 1st to said August 15th, 1924, but said Disbursing Officer refused to pay the remaining twenty (20%) per cent to petitioner.

-VII-

That the said twenty (20%) per cent so withheld by said Disbursing Officer from April 1, 1924 to September 15, 1924, amounts to Four Hundred and Two Dollars and Thirty-five cents ($402.35), which said amount petitioner is now entitled to receive.

-VIII-

That petitioner is informed and believes, and therefore alleges, that unless by this court compelled to pay the full salary and compensation of petitioner hereafter, said Disbursing Officer will continue to withhold twenty (20%) per cent thereof.

-IX-

That petitioner has frequently demanded of said Disbursing Officer payment of the sum so withheld, but has on each occasion met with refusal of said officer.

-X-

That the ordinary legal remedies do not afford petitioner adequate relief, and that petitioner has not here-

tofore sought from this court, or any other court, a Writ of Mandamus in this cause.

WHEREFORE, petitioner prays that the Judge of this court order the issuance of an alternative Writ of Mandamus demanding and directing the said E. H. Barber, United States Naval Disbursing Officer, Eleventh Naval District, to forthwith pay to petitioner the amount of Four Hundred and Two Dollars and Thirty-five cents ($402.35), with interest thereon, and costs, said amount being twenty (20%) per cent of petitioner's pay as Lieutenant Commander of the United States Navy, from the 1st day of April, 1924 to the 15th day of September, 1924, and to hereafter pay to petitioner on each and every payday thereafter, the full amount of the petitioner's compensation as fixed by the United States Statutes, or to appear before this court on the day to be named in said Writ to show cause, if any there be, why a peremptory Writ of Mandamus should not issue to compel the said payments.

And for such further and general relief as petitioner may be entitled to in the premises.

MOORE & FARRAHER

ATTORNEYS FOR PETITIONER

STATE OF CALIFORNIA)
) SS:
COUNTY OF LOS ANGELES)

WILLIAM BRAWNER HETFIELD, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action;

that he has read the foregoing complaint, knows the contents thereof, and the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

WILLIAM BRAWNER HETFIELD

Subscribed and sworn to before me
this 15th day of September, 1924.
FRANCES STOEKER (Seal)

NOTARY PUBLIC IN AND FOR
THE COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA.

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

WILLIAM BRAWNER HETFIELD,)
Petitioner,)
-vs-)
E. H. BARBER, United States Naval)
Disbursing Officer,)
Respondent.)

BRIEF OF AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Government accounting officers cannot under the law check disputed items against salaries fixed by Statute.

SMITH VS. JACKSON, 241 Fed. 746.
(Affirmed 246 U. S. 388).

ALSO:

DILLON VS. GROSS 299 Fed. Rep. p. 81.

United States Naval Disbursing Officer cannot check against the salaries of Naval Officers for any amounts claimed by the Disbursing Officer to be due the government on account of overpayment of dependency allowances.

DILLON VS. GROSS 229 Fed. Rep. p. 851;
Opinion of Attorney General 20 Op. Atty Gen 626.

(Endorsed):

I 13 M IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. WILLIAM BRAWNER HETFIELD Petitioner -vs- E. H. BARBER, United States Naval Disbursing Officer Respondent. PETITION FOR WRIT OF MANDAMUS FILED SEP 24 1924 CHAS. N. WILLIAMS, Clerk by L. J. Cordes Deputy Clerk MOORE & FARRAHER PACIFIC MUTUAL BUILDING LOS ANGELES ATTORNEYS FOR PETITIONER.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

WILLIAM BRAWNER HETFIELD, Petitioner, -vs- E. H. BARBER, United States Naval Disbursing Officer, Respondent.	ORDER GRANTING ALTERNATIVE WRIT OF MANDAMUS

Petition for Writ of Mandamus in the above entitled matter having this day been filed, and after reading the same, and on motion of James Farraher, one of the attorneys for the petitioner, William Brawner Hetfield,

IT IS ORDERED that the Clerk of this court issue the alternative Writ of Mandamus in accordance with the prayer of said petition. returnable before me, October 13th 1924 at 10 o'clock AM. in the Federal Building at Los Angeles California.

Dated: September 30th, 1924.

Paul J. McCormick

JUDGE OF THE ABOVE ENTITLED COURT

(ENDORSED)

I 13 M IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION WILLIAM BRAWNER HETFIELD, Petitioner, -vs- E. H. BARBER, United States Naval Disbursing

Officer, Respondent. ORDER GRANTING ALTERNATIVE WRIT OF MANDAMUS FILED SEP 30 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk MOORE & FARRAHER PACIFIC MUTUAL BUILDING, LOS ANGELES ATTORNEYS FOR PETITIONER

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD, Petitioner, -vs- E. H. BARBER, United States Naval Disbursing Officer, Respondent.	)	ALTERNATIVE WRIT OF MANDAMUS

UNITED STATES TO E. H. BARBER, UNITED STATES NAVAL DISBURSING OFFICER OF THE ELEVENTH NAVAL DISTRICT OF CALIFORNIA:

WHEREAS it appears from the petition of William Brawner Hetfield, this day filed, that he is a duly commissioned and acting Lieutenant Commander of the United States Navy with headquarters within said Eleventh Naval District, and that as such Naval Officer said petitioner is entitled to receive as salary from April 1, 1924, to September 15, 1924, both dates inclusive, monthly, the sum of Three Hundred Sixty-five Dollars and Seventy-five cents ($365.75), but that

you, as Disbursing Officer of the said Naval District, have failed and refused to pay said salary for said period, except eighty (80%) per cent thereof, and that you have, after demand on the part of said petitioner, refused to pay petitioner the remaining twenty (20%) per cent of his salary for said period;

NOW THEREFORE, you are commanded to forthwith pay to said petitioner, William Brawner Hetfield, the said twenty (20%) per cent of his salary withheld as in the petition alleged, or to appear before this Court and the Southern Division hereof, on the 13th day of October, 1924, at 10 A M and show cause, if any you have, why you should not pay said salary to said petitioner.

WITNESS the Honorable Paul J. McCormick, Judge of the District Court of the United States for the Southern District of California, Southern Division, at Los Angeles in said District the 30th day of September, 1924.

CHAS. N. WILLIAMS

CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

(SEAL)

R S Zimmerman

Deputy

Form No. 282.

RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA,)
) ss:
Sou District of Calif.)

I hereby certify and return that I served the annexed Petition for Writ of Mandamus, Order granting alternative Writ writ of Mandamus and Alternative Writ of Mandamus on the therein-named E. H. Barber, United States Naval Disbursing Officer, by handing to and leaving a true and correct copy thereof with the said E. H. Barber, United States Naval Disbursing Officer, personally at San Diego, California in said District on the First day of October, 1924., A. D. 191

A. C. Sittel,

U. S. Marshal.
By R. F. Gusweiler

Deputy.

(ENDORSED)

Marshal's Civil Docket No. 6156 IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION I 13 M WILLIAM BRAWNER HETFIELD, Petitioner -vs- E. H. BARBER, United States Naval Disbursing Officer Respondent. ALTERNATIVE WRIT OF MANDAMUS FILED OCT 3 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk MOORE & FARRAHER PACIFIC MUTUAL BUILDING, Los Angeles Attorneys for Petitioner

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

WILLIAM BRAWNER HETFIELD, Petitioner, vs. E. H. BARBER, United States Naval Disbursing Officer, Respondent.	No. I-13-M Eq. MOTION TO DISMISS.

Comes now E. H. BARBER, Naval Disbursing Officer of the Eleventh Naval District, respondent herein, and moves to dismiss the above entitled action upon the ground that this court has no jurisdiction thereof.

Dated this 20th day of October, 1924.

Joseph C. Burke

United States Attorney
O. R. McGuire

Special Assistant to
the Attorney General.

Service by copy this 20th day of October 1924

Moore & Farraher
Attys for Petitioner

(ENDORSED)

No. I-13-M Eq. IN THE District COURT OF THE UNITED STATES FOR THE Southern District of California Southern Division WILLIAM BRAWNER HETFIELD, Petitioner, vs. E. H. BARBER,

United States Naval Disbursing Officer, Respondent. MOTION TO DISMISS. FILED OCT 20 1924 CHAS. N. WILLIAMS, Clerk By Louis J. Somers Deputy Clerk

At a stated term, to wit: The July Term, A. D. 1924, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 28th day of November, in the year of Our Lord one thousand nine hundred and twenty-four.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

William Brawner Hetfield,)
Plaintiff)
vs.) No. I-13 M. Eq.
E. H. Barber United States)
Naval Disbursing Officer,)
Defendant)

This cause having been heretofore submitted to the court, it is by the court ordered at this time that respondent's motion to dismiss be and the same is hereby denied; and it is further ordered that a peremptory writ of mandamus issue as prayed.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

WILLIAM BRAWNER HETFIELD, Petitioner, vs. E. H. BARBER, United States Naval Disbursing Officer, Respondent.	No. I-13-M. In Equity. MEMORANDUM OPINION.

: :

Moore and Farraher, of Los Angeles, California, for the Petitioner. Joseph C. Burke, Esq., United States Attorney, and O. R. McGuire, Special Assistant to the Attorney General, for the Respondent.

: :

The Petitioner, Hetfield, a duly commissioned Lieutenant Commander of the United States Navy, in active service, asks for a Writ of Mandamus directed to Respondent, Barber, United States Naval Disbursing Officer, commanding said disbursing officer to pay to Hetfield certain amounts of salary withheld from said Hetfield by the disbursing officer under orders of the Secretary of the Navy and the Comptroller General of the United States.

The salary of Hetfield which is definitely fixed by statute is made payable monthly in the sum of $365.75. The Respondent is now retaining and refusing to pay over to the Petitioner twenty per cent of the salary due Petitioner from April 1st, 1924, to September 15th,

1924, amounting in the aggregate to $402.35. The retention and withholding of this amount is made because it is asserted by Respondent and the Comptroller General that Hetfield has been erroneously paid the sum of $2870.71 from the Treasury of the United States on account of alleged dependency allowances concerning his mother from April 22nd, 1919, to March 31st, 1922.

It appears that although at one time it had been determined and decided by the Government that Hetfield was entitled to said dependency allowances, later, upon an attempted review by the authorities, it was held by them that the allowances were not warranted and were illegally made.

The Respondent has appeared herein pursuant to the Alternative Writ of Mandamus and has moved to dismiss this entire proceeding upon the ground that this Court has no jurisdiction thereof. Respondent further contends that Mandamus is not available or appropriate to Petitioner under the facts and circumstances hereof.

I find no merit in Respondent's contentions. This proceeding is justified and authorized under the Judicial Code of the United States.

The salary of a Naval Officer being fixed by law at a definite and certain amount the duty of Respondent in paying and disbursing such salary to an officer is purely ministerial. His duty is plain in such cases and in the performance of his duty he is neither called upon nor permitted to exercise discretion or latitude as to what portion of the officer's salary he will pay or

withhold. He must pay the whole of the salary to the officer. If the Government as an entity has any legal and valid claim against the Petitioner it can pursue such by the regular legal processes and procedure, but neither the Respondent nor the Comptroller General nor the Secretary of the Navy nor any other agent of the Government can offset Government claims by withholding or retaining any portion of the statutory salary due to a Naval Officer. As long as there is money in the Treasury of the United States to pay the salary of a Naval Officer the statutory salary must be paid when due and in such event the disbursing agents have no room for the exercise of discretion with reference to the amount which they will pay as salary to the Naval Officer, and whenever it appears that strict compliance with the law is not observed by the governmental disbursing agencies Mandamus will issue to require and to command them to perform their duty.

The foregoing is not only sound in principle but finds support in the decisions of the Federal Courts. The Supreme Court of the United States has so ruled in confirming the case of Smith vs. Jackson, 241 Fed. 746, where the following pertinent language is used: "Every executive officer whose duty is plainly devolved upon him by statute, might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of his duty involved an interpretation of the statute by him and therefore it was not ministerial, and the Court would on that account be powerless to give relief. In this case we think that proper construction of the statute is clear and the salary should have been paid."

The foregoing case grew out of an effort upon the part of certain governmental agents to retain a portion of the salary of a Judge of the Canal Zone in payment of rental of quarters occupied by the Judge. The ruling was that the Judge's salary was fixed by statute and could not be checked against and that the function of paying and disbursing the statutory salary to the Judge was a mere ministerial act wherein the disbursing agent had no discretion or latitude as to the amount which he should pay to the Judge.

There have been cases cited by Respondent but all of them are in my opinion clearly distinguishable from the case at bar, as all of such cited cases required some exercise of judgment or discretion upon the part of the governmental agent against whom Mandamus or Injunction was sought. They involved an interpretation by the disbursing officer of some statute. No such situation exists here.

The precise question submitted for decision in this proceeding has been before two District Courts of the United States and also before the Attorney General of the United States and all of these authorities have uniformly held that the Comptroller General and the disbursing officers of the Navy are acting beyond their powers in endeavoring to check against the salary of Naval Officers. Dillon vs. Gross, 299 Fed. 851---- Howe vs. Elliott, 300 Fed. 243 --- 20 Op. Atty. Gen. 626.

Upon the authorities herein referred to and for the reasons hereinabove assigned the Respondent's motion to dismiss is denied, and the Petitioner is entitled to

the relief as prayed. Counsel for Petitioner will prepare and present an appropriate order pursuant hereto.

PAUL J. MC CORMICK

United States District Judge.

Dated this 28th day of November, 1924.

(ENDORSED)

No. I-13-M. In Equity. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California. Southern Division WILLIAM BRAWNER HETFIELD, PETITIONER, vs. E. H. BARBER, United States Naval Disbursing Officer, RESPONDENT. MEMORANDUM OPINION Filed November 28th, 1924 Chas. N. Williams, Clerk By Louis J. Somers, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

WILLIAM BRAWNER HETFIELD, Petitioner,	No. I-13-M. Equity.
- vs -	PEREMPTORY WRIT OF MANDAMUS
E. H. BARBER, United States Naval Disbursing Officer, Respondent.	

TO E. H. BARBER, DISBURSING OFFICER OF THE UNITED STATES NAVY FOR THE ELEVENTH NAVAL DISTRICT, SAN DIEGO, CALIFORNIA, GREETING:

WHEREAS, on the 24th day of September, 1924, William Brawner Hetfield, a duly commissioned Lieutenant Commander of the United States Navy, filed his petition in this court praying for a Writ of Mandamus, which petition is in words and figures as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD, Petitioner, - vs - E. H. BARBER, United States Naval Disbursing Officer, Respondent.	)	PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

The petition of William Brawner Hetfield respectfully shows:

I.

That petitioner is now and at all times herein mentioned was a citizen of the United States and a resident of this Judicial District, and a duly commissioned and acting Lieutenant Commander of the United States Navy.

II.

That E. H. Barber is the Disbursing Officer of the United States Navy for the Eleventh Naval District, which includes the City and County of Los Angeles, California, with his office at San Diego, California.

III.

That as such officer of the United States Navy, petitioner is entitled to receive as pay or salary, independent of any claims for dependency of relatives, the monthly sum of Three Hundred Sixty five and 75/100 ($365.75) Dollars.

IV.

That on May 22, 1924, petitioner was informed in writing by the Comptroller General, through his solicitor, that on March 17, 1924, it had been found that petitioner had erroneously been paid the sum of Two Thousand Eight Hundred Seventy and 71/100 ($2870.71) Dollars, for what was termed "alleged dependency by you (petitioner) of your (petitioner's) Mother for a period from April 22, 1919 to March 31, 1922," and said communication contained a demand upon petitioner for the payment of said sum to the United States government; that petitioner refused to pay said sum on the ground that the dependency allowances referred to in said communication had been applied for in good faith by petitioner and been approved by the proper accounting officers and properly paid to petitioner.

V.

That thereafter said E. H. Barber, Disbursing Officer, refused to pay to petitioner any portion of his

pay or compensation as Naval Officer, and has refused to pay the dependency allowances for which petitioner filed affidavits in proper form.

VI.

That said Disbursing Officer gave as his reason for refusing to pay petitioner his compensation fixed by the United States Statute, that petitioner was indebted to the United States in the amount of Two Thousand Eight Hundred Seventy and 71/100 ($2870.71) Dollars, and that no money is to be paid to petitioner on account of his compensation as such Naval Officer until he had either paid the said amount, or the compensation withheld had offset said amount; that said condition continued until the 15th day of August, 1924, when said Disbursing Officer paid eighty (80%) per cent of the compensation earned by petitioner, as fixed by the United States Statutes, from April 1st to said August 15, 1924, but said Disbursing Officer refused to pay the remaining twenty (20%) per cent to petitioner.

VII.

That the said twenty (20%) per cent so withheld by said Disbursing Officer from April 1, 1924 to September 15, 1924, amounts to Four Hundred Two and 35/100 ($402.35) Dollars, which said amount petitioner is now entitled to receive.

VIII.

That petitioner is informed and believes, and therefore alleges, that unless by this Court compelled to pay the full salary and compensation of petitioner hereafter, said Disbursing Officer will continue to withhold twenty (20%) per cent thereof.

IX.

That petitioner has frequently demanded of said Disbursing Officer payment of the sum so withheld, but has on each occasion met with refusal of said officer.

X.

That the ordinary legal remedies do not afford petitioner adequate relief, and that petitioner has not heretofore sought from this Court, or any other Court, a Writ of Mandamus in this cause.

WHEREFORE, petitioner prays that the Judge of this court order the issuance of an Alternative Writ of Mandamus demanding and directing the said E. H. Barber, United States Naval Disbursing Officer, Eleventh Naval District, to forthwith pay to petitioner the amount of Four Hundred and Two and 35/100 ($402.35) Dollars, with interest thereon, and costs, said amount being twenty (20%) per cent of petitioner's pay as Lieutenant Commander of the United States Navy, from the 1st day of April, 1924, to the 15th day of September, 1924, and to hereafter pay to petitioner on each and every payday thereafter, the full amount of the petitioner's compensation as fixed by the United States Statute, or to appear before this Court on the day to be named in said Writ to show cause, if any there be, why a peremptory writ of mandamus should not issue to compel the said payments.

And for such further and general relief as petitioner may be entitled to in the premises.

MOORE & FARRAHER

____

Attorneys for Petitioner

(Verification)

and,

WHEREAS, on the 30th day of September, 1924, upon the order of this Court, an Alternative Writ of Mandamus was issued herein, returnable before me on the 13th day of October, 1924, and thereupon continued to the 27th day of October, 1924, at which time hearing was had thereon; and it appearing at said hearing that you, acting as the disbursing officer for the United States Navy, duly authorized to pay the salary of petitioner, the said William Brawner Hetfield, as fixed by statute, are now retaining and refusing to pay over twenty (20%) per cent of the salary due petitioner from April 1, 1924 to September 15, 1924, in the aggregate sum of Four Hundred and Two and 35/100 ($402.35) Dollars; and it further appearing that such withholding by you of any part of petitioner's salary, as fixed by law, is not warranted and was illegally made;

NOW THEREFORE, I DO COMMAND YOU, that you, the said E. H. Barber, to pay to petitioner, the said William Brawner Hetfield, the salary withheld in the aggregate amount of Four Hundred and Two and 35/100 ($402.35) Dollars, with interest thereon, said amount being twenty (20%) per cent of petitioner's pay as Lieutenant Commander of the

United States Navy from April 1, 1924 to September 15, 1924, together with any subsequent withholding of petitioner's salary as fixed by law, and you are further commanded to make return to this Writ on the 15th day of December, 1924, showing obedience thereto.

Dated this 2nd day of December, 1924.

Paul J. McCormick

Judge of the District Court of the United States.

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,)
) ss:
Sou District of Calif)

I hereby certify and return that I served the annexed peremptory Writ of Mandamus on the therein-named E. H. Barber United States Naval Disbursing Officer by handing to and leaving a true and correct copy thereof with E. H. Barber personally at San Diego Cal in said District on the Fourth day of December, A. D. 1924.

A. C. Sittel

U. S. Marshal.

By R. F. Gusweiler

Deputy.

(ENDORSED)

Marshal's Civil Docket No. 6156. No. I-13-M. Equity. IN THE DISTRICT COURT OF THE

UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION WILLIAM BRAWNER HETFIELD, Petitioner, - vs - E. H. BARBER, United States Naval Disbursing Officer, Respondent. PEREMPTORY WRIT OF MANDAMUS FILED DEC 12 1924 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy Clerk MOORE & FARRAHER PACIFIC MUTUAL BUILDING, Los Angeles ATTORNEYS FOR PETITIONER

Receipt of a copy of the within Peremptory Writ of. Mandamus is hereby acknowledged this 3rd day of December, 1924.

UNITED STATES DISTRICT ATTORNEY
By Robert B. Camarillo.

Receipt of a copy of the within Peremptory Writ of Mandamus is hereby acknowledged on this fourth day of December, 1924.

E. H. Barber,

Respondent.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD, Petitioner, vs. E. H. BARBER, United States Naval Disbursing Officer, Respondent.	No. I-13-M Equity PETITION FOR APPEAL

TO THE HONORABLE PAUL J. McCORMICK, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

The above named respondent, E. H. BARBER, United States Naval Disbursing Officer, feeling himself aggrieved by the Order made and entered in this cause on the 28th day of November, 1924, and by the Peremptory Writ of Mandamus issued pursuant thereto, on the 2nd day of December, 1924, does hereby appeal from said Order and Decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that his Appeal be allowed and that Citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California;

And your respondent and petitioner further represents that he is the United States Naval Disbursing Officer at San Diego, California, and that said Decree affects directly the payment of moneys of the United States of America, and desiring to supersede the execution of the Decree, Order and Peremptory Writ of Mandamus, petitioner hereby prays that with the allowance of the Appeal, a supersedeas be issued without bond.

JOSEPH C. BURKE
JOSEPH C. BURKE
United States Attorney
J. Edwin Simpson
J. E. SIMPSON
Assistant United States Attorney
O. R. McGuire
O. R. McGUIRE
Special Assistant to the Attorney General

Solicitors for Respondent

Dated this 11th day
of December, 1924.

(ENDORSED):

No. I-13-M Equity IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California Southern Division WILLIAM BRAWNER HETFIELD, Petitioner vs. E. H. BARBER, United States Naval Disbursing Officer, Respondent PETITION FOR APPEAL FILED DEC 12, 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk. Service of a Copy of the Within Petition for Appeal acknowledged December 12, 1924 Moore & Farraher E. D. Moore Attorneys for the Petitioner and Appellee.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD, Petitioner,	)	No. I-13-M Equity
vs.	)	
E. H. BARBER, United States Naval Disbursing Officer, Respondent.	)	ASSIGNMENT OF ERRORS

Now comes the respondent in the above entitled cause and files the following Assignment of Errors upon which he will rely in his prosecution of the Appeal in the above entitled cause, from the Order made by the Honorable Court on the 28th day of November, 1924, and from the Peremptory Writ of Mandamus issued pursuant thereto on the 2nd day of December, 1924.

I.

That the United States District Court for the Southern District of California erred in denying respondent's motion to dismiss the Action for the reason that the court had no jurisdiction thereof.

II.

WHEREFORE respondent prays that the Order of the District Court for the Southern District of California may be reversed, and said court directed to dismiss the Bill and vacate its order decreeing that a Peremptory Writ of Mandamus issue, and recalling

the Peremptory Writ of Mandamus issued pursuant to said decree.

Joseph C. Burke
JOSEPH C. BURKE
United States Attorney
J. Edwin Simpson
J. E. SIMPSON
Assistant United States Attorney
O. R. McGuire
O. R. McGUIRE
Special Assistant to the Attorney General

Solicitors for Respondent

(ENDORSED):

No. I-13-M Equity IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California Southern Division WILLIAM BRAWNER HETFIELD, Petitioner vs. E. H. BARBER, United States Naval Disbursing Officer Respondent ASSIGNMENT OF ERRORS FILED DEC 12 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman, Deputy Clerk. Service of the within Assignment of Errors and receipt of a copy thereof is acknowledged this 12th day of December 1924 Moore & Farraher E. D. Moore.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD, Petitioner,	No. I-13-M Equity
vs.	
E. H. BARBER, United States Naval Disbursing Officer, Respondent.	ORDER ALLOWING APPEAL

On motion of J. E. Simpson, one of the solicitors and counsel for respondent in the above entitled cause, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Decree entered herein on the 28th day of November, 1924, be and the same is hereby allowed, and that a certified transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the Appeal shall operate as a supersedeas and that no bond shall be required. Dated this 12th day of December, 1924.

Paul J. McCormick
United States District Judge

APPROVED AS TO FORM
as provided in Rule 45

Moore and Farraher
E. D. Moore

Solicitor for the Petitioner

(ENDORSED):

No. I-13-M Equity IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California Southern Division WILLIAM BRAWNER HETFIELD Petitioner, vs. E. H. BARBER, United States Naval Disbursing Officer, Respondent. ORDER ALLOWING APPEAL FILED DEC 12 1924 CHAS. N. WILLIAMS, Clerk By R S. Zimmerman, Deputy Clerk. Service of the within "Order Allowing Appeal" and receipt of a copy thereof is acknowledged this 12th day of December. Moore & Farraher E. D. Moore Attorneys for Hetfield.

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
Southern District of California
Southern Division.

WILLIAM BRAWNER HETFIELD	)Clerk's Office
Petitioner and Appellee	)
vs.	) No. I-13-M
E. H. BARBER	) Equity
Respondent and Appellant.	) Praecipe

TO THE CLERK OF SAID COURT:

Sir:

Please issue certified copy of Transcript of Record for use in appeal to Circuit Court of Appeals, 9th Circuit, in the above entitled matter, including therein the following:

1. Petition for Writ of Mandamus
2. Order allowing Alternative Writ of Mandamus
3. Alternative Writ of Mandamus
4. Motion to Dismiss

5. Order of Court Denying motion to dismiss.
6. Opinion of Court.
7. Order for peremptory Writ of Mandamus
8. Peremptory Writ of Mandamus
9. Petition for Appeal
10. Order allowing Appeal
11. Assignment of Errors.
12. Citation.

J. Edwin Simpson
J. Edwin Simpson,
Assistant United States Attorney.

Copy received Dec. 15/1924
Moore & Farraher
E. D. Moore

(ENDORSED):

No. I-13-M U. S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA. Southern Division William Brawner Hetfield vs. E. H. Barber, PRAECIPE FOR Transcript of Record FILED DEC 18 1924 CHAS. N. WILLIAMS, Clerk By R. S. Zimmerman Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

WILLIAM BRAWNER HETFIELD,
Petitioner,
vs.
E. H. BARBER, United States Naval Disbursing Officer,
Respondent.

CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 34 pages, numbered from 1 to 34 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, petition for writ of mandamus, order allowing alternative writ of mandamus, writ of mandamus, motion to dismiss, order of court denying motion to dismiss, opinion of the court, order for peremptory writ of mandamus, peremptory writ of mandamus, assignment of errors, petition for appeal, order allowing appeal for praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on appeal amount to

and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-four, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 4401

In the Circuit Court of Appeals of the United States for the Ninth Circuit

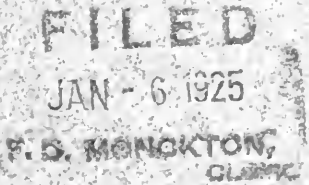
E. H. BARBER, NAVAL DISBURSING OFFICER,
APPELLANT

v.

WILLIAM BRAWNER HETFIELD, APPELLEE

BRIEF FOR APPELLANT

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1925



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1. The proceeding is against the United States as the real party in interest;	
2. Suits against the United States by its officers are excepted by the judicial code from the concurrent jurisdiction of United States District Courts;	
3. The jurisdictional statute of District Courts only authorizes issuance of writs of mandamus, when necessary to their jurisdiction or agreeable to the usages and principle of law; and	
4. Decisions of the Supreme Court in parallel cases have held that such writs could not be issued where general appropriations are concerned.	
II. The court had no jurisdiction to command a subordinate Federal officer to make payments from general appropriations contrary to the orders of his superior officers, for	18
1. The Constitution gives to Congress control over public money and courts are without jurisdiction to require payments from general, as distinguished from specific appropriations;	
2. No money may be drawn from a general appropriation except upon an appropriation warrant countersigned by the Comptroller General and jurisdiction to determine credits on the books of the Treasury against advances made is committed by law to the Comptroller General and not to District Courts;	
3. The present requirement that the accounting officers state accounts and determine availability of general appropriations is older than the present system of government;	
4. The accounting officers are required to superintend recovery of balances determined by them to be due to the United States; and	

25046—24——1

ARGUMENT—Continued.

II. The court had no jurisdiction, etc.—Continued. Page.

5. A subordinate Federal officer will not be commanded to act contrary to the orders of his superior officer nor enjoined from executing the orders of his superior officers.

III. The statement of the account of a naval officer and the charging and payment of credit balances from general appropriations is a discretionary duty not subject to control of District Courts, by means of writs of mandamus, for ________________________________ 21

1. The rate of pay of an officer of the Navy is determined by terms of permanent law upon the basis of grade held, length and character of service, and duty performed and requires exercise of discretion in its ascertainment;

2. The rate of pay as finally determined from the terms of the statute as construed by the courts, the accounting officers and the disbursing officer is paid from a lump sum appropriated for the pay of all officers of the Navy for the current fiscal year;

3. The accounts of the Navy officers are audited and stated by the Comptroller General, funds are advanced on appropriation warrants countersigned by the Comptroller General to disbursing officers with which to pay credit balances, and the payments made by the disbursing officer are then audited and settled by the Comptroller General to determine whether the proper credit balances were paid to the respective naval officers; and

4. Decisions of the courts issuing writs of mandamus against disbursing officers requiring them to make specific payments from appropriations made specifically to pay the particular petitioner and where the Comptroller General had no jurisdiction to state the account of the petitioner do not overrule the prior decisions of the same courts holding that writs of mandamus would not issue requiring payments from general, or lump-sum appropriations subject to the discretionary audit and control of the Comptroller General.

IV. The accounting officers have been and are required to superintend the recovery of balances certified by them to be due the United States on a statement of an account and the Comptroller General may order the withholding of the whole or any part of the pay

ARGUMENT—Continued. Page.

of a naval officer as circumstances may warrant until the withheld pay balances the account, for ---------- 39

1. Such practice has been followed for more than a century;
2. It is required by statute; and
3. Has been recognized and approved in numerous decisions of the United States Supreme Court and the Court of Claims.

V. The District Court erred in not dismissing the petition and in issuing a mandamus compelling appellant to pay from general appropriations sums theretofore withheld from appellee's pay pursuant to the orders of the Comptroller General and of the Secretary of the Navy and commanding him to continue payments of the full amount of his salary from time to time from general appropriations, for ------------------ 48

1. Appellant has intrusted to his care only a limited amount of public money and he can not secure any more except with the approval of the Comptroller General;
2. Appellant's accounts are required to be audited and settled by the Comptroller General and he is liable under his official bond for any credits denied by the Comptroller General;
3. Appropriations have not been made for the support of the Navy for an indefinite period;
4. The mandate of the District Court can not secure additional funds for appellant nor can it secure credit in appellant's accounts with the Treasury; and
5. Compliance with the mandate of the court below will render appellant subject to pecuniary liability and to the disciplinary measures of his superior officers.

AUTHORITIES

Cases:

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Brashear v. *Mason*, 6 Howard, 93 --------------- 4, 12, 22, 23, 24
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Gratiot v. *United States*, 15 Peters, 336 ____ 30, 44
Greene v. *Purnell*, 12 Md. 329 ____ 17
Houston v. *Ormes*, 252 U. S. 469 ____ 52
Howe v. *Elliott*, 300 Fed. 243 ____ 35
Lewis Publishing Co. v. *Wyman*, 152 Fed. 200 ____ 3
Louisiana v. *McAdoo*, 234 U. S. 627 ____ 3
Martin v. *Greene*, 29 N. Y. 647 ____ 17
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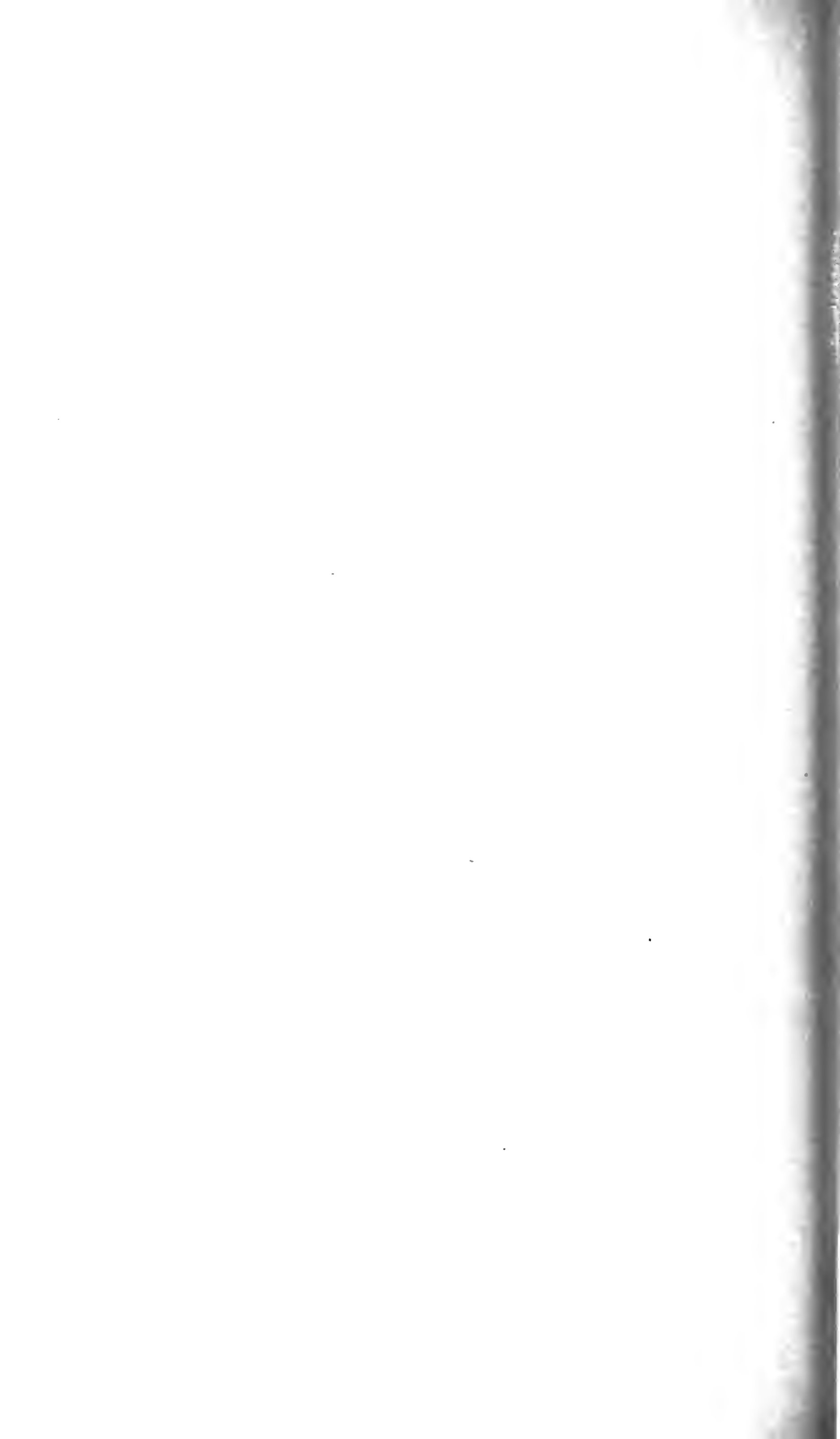

In the Circuit Court of Appeals of the United States for the Ninth Circuit

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E. H. BARBER, NAVAL DISBURSING Officer, appellant, *v.* WILLIAM BRAWNER HETFIELD, appellee	No. ——

BRIEF ON BEHALF OF APPELLANT, E. H. BARBER, NAVAL DISBURSING OFFICER

STATEMENT OF THE CASE

This is an appeal from a decree of the United States District Court for the Southern District of California, Southern Division, Judge McCormick, granting a petition docketed on the Equity side of the court of William Brawner Hetfield, lieutenant commander, U. S. Navy, appellee, for a writ of mandamus directing E. H. Barber, naval disbursing officer, appellant, to pay 20 per centum withheld from his pay pursuant to orders of the Secretary of the Navy dated August 11, 1924, and of the Comptroller General of the United States to liquidate an indebtedness of $2,820.71 certified by the Comptroller General in a statement of appellee's account to be due the United States.

The petitioner averred that $402.35 had been withheld as 20 per centum of his pay for the period from April 1 to September 15, 1924, and prayed for a writ of mandamus against appellant requiring payment thereof notwithstanding the Comptroller General had certified that upon a statement of appellee's account he was indebted to the United States in the sum of $2,870.71, as overpayments for the period from April 22, 1919, to March 31, 1922. The petitioner, appellee, further prayed that appellant be directed to thereafter pay him the full amount of his compensation. Appellant moved that the petition be dismissed on the ground that the District Court had no jurisdiction to grant the relief prayed for. The court overruled the motion and on November 28, 1924, directed issuance of the writ as prayed. From this decree this appeal was taken on the grounds that the United States District Court for the Southern District of California erred in denying respondent's motion to dismiss the action for the reason that the court had no jurisdiction thereof.

ARGUMENT

I

The court had no jurisdiction under the judicial code, or otherwise, to direct the issuance of a writ of mandamus to the appellant, a naval disbursing officer, requiring him to pay from general appropriations sums withheld from appellee's, a naval officer's salary to apply on his indebtedness to the United States

At the threshold of every proceeding at law or in equity in the District and Circuit Courts of

Appeal of the United States is the question of jurisdiction. The law is well settled that the courts of the United States inferior to the Supreme Court are creatures of Congress and possess no powers except those specifically granted to them by acts of Congress, and this limitation applies to all causes which, under the Constitution, Congress might have granted them jurisdiction to hear and determine. (*Brown* v. *Keene,* 8 Peters, 112; *Robertson* v. *Cease,* 97 U. S. 646, *Stevenson* v. *Fain,* 195 U. S. 165; *Lewis Publishing Company* v. *Wyman,* 152 Fed. 200.) So well settled is this principle of law the presumption is that a cause is without the jurisdiction of United States District Courts, unless the contrary be affirmatively shown. (*Ex parte Smith,* 94 U. S. 455; *Shade* v. *Northern Pacific Railroad Company,* 206 Fed. 353.)

There are two other principles of law to which the court's attention is invited in connection with this entire question of jurisdiction of the court below to direct the issuance of a writ of mandamus to a disbursing officer of the Navy requiring him to pay from general appropriations sums of salary to a Naval officer, and these are: (1) that a proceeding against an officer of the United States concerning public money is a proceeding against the United States, for jurisdiction must be determined by the real and not the nominal parties in interest (*Wells* v. *Roper,* 246 U. S. 335; *Louisiana* v. *McAdoo,* 234

U. S. 627; *Oregon* v. *Hitchcock,* 202 U. S. 60; and (2) that the United States may not be sued except with its consent and in the courts and form expressly provided by law for that purpose (*Comegys* v. *Vasse,* 1 Peters, 193; *Nicholl* v. *United States,* 7 Wall. 122; *Belknap* v. *Schild,* 161 U. S. 10).

For more than three quarters of a century, and until the establishment of the Court of Claims in 1855, the United States could not be sued. Then, as now, the original Judiciary Act of 1789, carried into the Revised Statutes as section 716, provided that—

> The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided by statute, which may be necessary to their respective jurisdictions and agreeable to the usages and principles of law.

There is here no specific grant of authority to United States District Courts to issue writs of mandamus to Naval disbursing officers requiring them to pay from general appropriations sums of salary to Naval officers, and it has been settled by decisions of the United States Supreme Court which are imperatively binding on the court below and on this court that said statute contains no legislative grant of jurisdiction to issue such writs. In *Brashear* v. *Mason* (6 Howard, 93) an applica-

tion was made by an officer of the Navy for a writ of mandamus to the Secretary of the Navy and not to one of his subordinates, as here directing him, to cause payment to be made of his salary. The Supreme Court affirmed the action of the lower court in refusing to direct issuance of the writ. The court, among other things, said:

> In the case of *Decatur* v. *Paulding* (14 Peters, 497) it was held by this court that a mandamus would not lie from the Circuit Court of this District to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund also was under the control of the Secretary and the moneys payable on his own warrant. *Still the court refused to inquire into the merits of the claim* of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the Secretary, *on the ground that the court below had no jurisdiction over the case,* and, therefore, the question not properly before this court on the writ of error. [Italics supplied.]
>
> *　　*　　*　　*　　*
>
> The principles of the case of Mrs. Decatur are decisive of the present one. The facts

here are much stronger to illustrate the inconvenience and unfitness of the remedy.

> * * * * *
>
> It will not do to say that the result of the proceeding by mandamus would show the title of the realtor to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for upon this ground any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common in the enforcement of demands upon the government as the action of assumpsit to enforce like demands against individuals.

The lower court there had no jurisdiction under the Judiciary Act, the same section of which is the sole source of jurisdiction taken in this case because the United States had not consented to be sued by its Naval officers. The United States has not to this day consented to be sued in District courts by any of its officers or employees, for section 24 of the Judicial Code of March 3, 1911 (36 Stat. 1093), expressly denies jurisdiction to United States District Courts of—

> Cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purposes by persons claiming as such officers or as assignees or legal representatives thereof.

Appellee could not have sued the United States in the court below for the sum alleged to have been illegally withheld from his salary. He could only sue in the Court of Claims in Washington. (See *United States* v. *McCrary,* 91 Fed. 295; *Scully* v. *United States,* 193 Fed. 185.) The language of the United States Supreme Court in *United States* v. *Guthrie* (17 Howard, 284), where a territorial judge had sought a writ of mandamus against the Secretary of the Treasury to require payment of his salary, is peculiarly applicable to the action of the court below in this case, that is—

> Unless there could have been shown some power in the circuit court competent to the repealing of the legislation of Congress, in the organization by the Treasury Department—competent, too, to the annulling of the explicit rulings of this court in the cases hereinbefore cited—the circuit court could have no jurisdiction to entertain the application for a writ of mandamus in this instance.

There can be no doubt that prior to 1855 no court of the United States had jurisdiction to issue a writ of mandamus to any officer of the United States requiring the payment of public money from the Treasury on any account whatever, and it is submitted that the consent of the United States to be sued in the Court of Claims and concurrently in the District Courts on certain limited causes of action did not change the law as to the issuance of mandamus requiring the payment of public money,

especially where the court, as here, does not have jurisdiction to entertain a suit in the particular cause of action. Appellee and the court below rely on *Smith* v. *Jackson* (246 U. S. 388) as being applicable and as having established a different rule. That case will be explained and distinguished at the proper place in this brief, it being sufficient here to point out that the jurisdictional statutes, sections 552, 554 and 555 of the Code for the Panama Canal Zone, set out in full in 241 Fed. at page 752, are much broader than section 716, Revised Statutes, under which the court below in this case took jurisdiction. This is also true of *United States* v. *McVeagh* (214 U. S. 124), which arose in the District of Columbia. There is nothing in either decision to indicate any intention to modify or reverse the *Decatur, Brashear* and *Guthrie* cases or to overthrow a practice existing since the beginning of the Government.

II

The court had no jurisdiction to issue a writ of mandamus to appellant, a naval disbursing officer, requiring him to make payments from general appropriations to appellee, a naval officer, contrary to the orders of the Secretary of the Navy and the Comptroller General of the United States

Article 1, Section 9, of the Constitution, provides that—

> No money shall be drawn from the Treasury but in consequence of an appropriation made by law; and a regular statement and account of the receipts and expenditures of

> all public money shall be published from time to time.

The fundamental law of the land gives to Congress exclusive power to appropriate money, and it has been held, as would appear to be obvious, that the power to appropriate carries with it the power to specify the purposes for which the money may be used, and whether, if at all, an accounting therefor shall be required. (*United States* v. *McDougall,* 121 U. S. 89; *Caro Co.* v. *United States,* 20 Ct. Cls. 174; *Shipman* v. *United States,* 18 *id.* 137.) Even under the Confederation there was an accounting system. It was established by the Ordinance of September 26, 1778, Vol. XII, Journals of the Continental Congress, pages 956 to 961, which provided for a Comptroller, an auditor, a treasurer, and two chambers of accounts. The auditor was required to receive all claims brought against the United States for money lent, expended, or advanced, goods sold or purchased, services performed or work done, and to refer them to one of the chambers of accounts. Said Ordinance further provided:

> That the commissioners to whom an account is referred * * * shall carefully examine the authenticity of the vouchers (rejecting such as shall not appear good), compare them with the articles to which they relate, and determine whether they support the charges; that they shall reduce such articles as are overcharged, and reject such

as are improper, and shall endorse the accounts in the manner marked C, and transmit them with the vouchers to the auditor and cause an entry to be made of the balances passed.

That the auditor shall receive the vouchers and accounts from the commissioners to whom he referred them, and cause them to be examined by his clerks. He shall compare the several articles with the vouchers, and if the parties concerned shall appeal from the judgment of the commissioners, he shall call before him the commissioners and the party, and hear them, and then make determination, from whence no appeal shall lie, unless to congress. That after a careful examination of the account as aforesaid, he shall endorse it in the manner marked D, of which indorsement he shall send a duplicate, to be filed in the same chamber of accounts and shall transmit the account and vouchers to the comptroller.

That the comptroller shall keep the treasury books and seal and shall file all the accounts and vouchers on which the accounts in said books are forwarded, and shall direct the manner of stating and keeping the public accounts. He shall draw bills under the said seal, on the treasurer, for such sums as shall be due by the United States, on accounts audited [which, previous to the payment, shall be countersigned by the auditor] and also for such sums as may, from time to time, be ordered by resolution of congress [which previous to the payment shall be counter-

signed by the Secretary of Congress] * * *. That when monies are due to the United States on accounts audited he shall notify the debtor, and (after hearing him if he shall desire to be heard) fix a day, for payment [according to the circumstances of the case not exceeding ninety days] of which he shall give notice to the auditor, in writing * * *.

That he shall, every quarter of a year, cause a list of the balances on the treasury books to be made out by his clerks, and pay it before congress. That, where any person hath received public monies, which shall remain unaccounted for, or shall be otherwise indebted to the United States, or have an unsettled account with them, he shall issue a summons * * *, in which a reasonable time shall be given for the appearance of the party, according to the distance of his place of residence from the treasury, of which he shall notify the auditor:

That, in case a party summoned to account shall not appear, nor make good essoign, the auditor, on proof of service made in due time or other sufficient notice, shall make out a requisition * * *, which he shall send to the comptroller's office where the same shall be sealed, and then it shall be sent to the executive authority of the State in which the party shall reside.

In other words, no money could be secured from the public treasury except upon a warrant countersigned by the Comptroller. Said requirement ap-

peared in the act of September 2, 1789 (1 Stat. 65), organizing the Treasury Department, was continued in the acts of March 3, 1817 (3 Stat. 366), and July 31, 1894 (28 Stat. 207), reorganizing the accounting offices of the treasury and, under the act of June 10, 1921 (42 Stat. 23, 27), amending and reorganizing the accounting system, exists to-day as a duty of the Comptroller General of the United States. This means that not one dollar could be placed to the disbursing account of appellant should the Comptroller General refuse to countersign a warrant debiting the general appropriations for the support of the Navy and crediting his disbursing account. This safeguard was recognized by Mr. Justice Nelson in delivering the opinion of the Court in *Brashear* v. *Mason* (6 Howard, 93, *supra*), where he said, at pages 100 and 101, that—

> We are also of opinion that if the plaintiff had made out a title to his pay as an officer of the United States navy, a mandamus would not lie in the court below to enforce the payment.
>
> The Constitution provides that no money shall be drawn from the treasury but in consequence of appropriations made by law. (Art. I., Sec. 9). And it is declared by act of Congress (3 Statutes at Large, p. 689, Sec. 3) that all moneys appropriated for use of the war and navy departments shall be drawn from the treasury by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of these de-

partments, countersigned by the second comptroller.

And by the act of 1817 (3 Statutes at Large, p. 367, Secs. 8, 9) it is made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. And all warrants drawn by the Secretary of the Treasury upon the treasurer shall specify the particular appropriations to which the same shall be charged; and the moneys paid by virtue of such warrants shall, in conformity therewith, be charged to such appropriations in the books kept by the comptrollers; and the sums appropriated for each branch of expenditure in the several departments shall be solely applied to the object for which they are respectively appropriated and no others. (2 Statutes at Large, p. 535, Sec. 1.)

Formerly the moneys appropriated for the war and navy departments were placed in the treasury to the credit of the respective secretaries. That practice has changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury, countersigned by the comptroller.

The Comptroller General, who, by the act of June 10, 1921, succeeded the former auditors and Comptroller of the Treasury, is endowed with large powers and responsibility and it is his sworn duty under the law to determine the availability of general appropriations and whether any sum is

properly payable therefrom. This responsibility was also recognized by the Supreme Court in *United States* v. *Lynch* (137 U. S. 280), where the Court denied a mandamus to the accounting officers, and said:

> The contention of the relator is that the interpretation he puts upon the act is too obviously correct to admit of dispute, and that this court has so decided but it does not follow because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority. (*Snow* v. *United States,* 118 U. S. 346; *Baltimore and Potomac Railroad Co.* v. *Hopkins.* 130 U. S. 210.) In *Clayton* v. *Utah Territory* (132 U. S. 632) the power vested in the governor of the Territory of Utah by the organic act to appoint an auditor of public accounts was drawn in question; and

in *Clough* v. *Curtis* (134 U. S. 361, 369) the lawful existence, as the legislative assembly of the Territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by Congress, was controverted. In *Neilson* v. *Lagow* (7 How. 772, 775, and 12 How. 98) the plaintiff in error claimed the land in dispute through an authority exercised by the Secretary of the Treasury, and the State court decided against its validity. The existence or validity of the authority was primarily involved in these cases, and they contain nothing to the contrary of our present conclusion.

Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case.

The Ordinance of September 26, 1778, also required the accounting officers to audit and settle claims and accounts against the United States; that is, determine whether the payments claimed or the payments made for which credit was requested against funds advanced were authorized by law. The accounting officers under the Constitution have also had that power and duty continued and imposed on them by the several statutes organizing and reorganizing the accounting system; that

is, the acts of September 2, 1789, March 3, 1817, July 31, 1894, and June 10, 1921, *supra.* A good description of this function is found in the opinion of the Court of Claims in *McKnight* v. *United States* (13 Ct. Cls. 299), where the court, after referring to the fact that the accounting officers audited and paid certain claims, at page 304, said:

> But vast sums of money are paid to parties for salaries and on other accounts by disbursing officers before the claims have passed the Treasury accounting, and the number of such officers is large, their appointments being provided for by special or general provisions of statute. * * * They are all under bonds and responsible for the legality and correctness of their payments. Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightfully paid.

These settlements are made by statute conclusive on all executive officers of the United States, including appellant and appellee. See act of March 30, 1868 (15 Stat. 54), as now contained in section 304 of the act of June 10, 1921 (42 Stat. 24). See also *Winnissimet* v. *United States* (12 Ct. Cls. 349). The decree of the Court below can not operate to give appellant credit in his accounts for the sums directed to be withheld from the salary of appellee

nor can it operate to force the Comptroller General to do that which the Supreme Court held in *United States* v. *Lynch, supra,* it did not have authority to do, that is, countersign a warrant placing additional funds to the credit of appellee. These principles are so obvious that no extended discussion of them would seem necessary, and it is equally obvious that neither the court below nor this court has authority to repeal statutes establishing the financial machinery of the United States and statutes, too, which have been in existence in one form or another since before the establishment of the Government itself. As to the rule in states where the accounting system is similar to that of the United States, see *Martin* v. *Greene* (29 N. Y. 647); *Carroll* v. *County Board* (28 Miss. 38); *Greene* v. *Purnell* (12 Md. 329); *Dewey* v. *State Auditors* (32 Mich. 191); *People* v. *Auditor General* (38 Mich. 746).

So far as the memorandum opinion discloses, the Court below gave no consideration to the foregoing insuperable obstacles to forcing a disbursing officer to make a payment from a limited amount of general appropriations intrusted to him for a particular purpose and contrary to the orders of the Comptroller General of the United States, nor did it give any consideration to the further insuperable obstacle that the Secretary of the Navy had ordered appellant by a general order dated August 11, 1924, and of which this court will take judicial notice on the authority of *Caha* v. *United States* (152 U. S.

211) to not pay petitioner in excess of 80 per centum of his pay but to withhold 20 per centum to apply on his indebtedness to the United States. Both matters were brought to the attention of the Court below in the oral argument and in a memorandum brief filed with the Court. The decision of the United States Supreme Court in *Plested* v. *Abbey* (228 U. S. 42), is squarely in point and is a much stronger case than the one at bar, for the Constitutional inhibition to the control of the courts over public money was not present. The court there said, among other things, that—

> We are of opinion that the principle which caused the Circuit Court to hold that it had no jurisdiction to award the relief prayed and hence to dismiss the bill was a correct one. The United States had not parted with legal title to the land, the defendants were subordinate officers of the Land Department, and the acts complained of were done pursuant to instructions from the head of the Land Department, vested by law with the power to control the conduct of his subordinates in matters of this character.
>
> As officers administering the land laws, the defendants were, in the nature of things, under the control and their acts were subject to the review of their official superiors—the Commissioner of the General Land Office and ultimately of the Secretary of the Interior. As said in *Litchfield* v. *Register & Receiver* (9 Wall. 575, 578), subordinate officials of the Land Department should not

> be called upon "to put the court in possession of their views and defend their instructions from the Commissioner and convert the contest before the Land Department into one before the court."
>
> * * * In the last named decision (*United States ex rel Ness* v. *Fisher,* 223 U. S. 683) the *Litchfield case* was cited with approval, and it was again reiterated that Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and *quasi-judicial* functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands.

The Secretary of the Navy is vested by law with the control of the officers of his department, and the General Accounting Office, presided over by the Comptroller General of the United States, who is required by section 304 of the act of June 10, 1921 (42 Stat. 24), to exercise his functions without direction from any other officer, also has large administrative and *quasi-judicial* functions to be exerted for the purpose of the execution of the laws relating to the limitations, directions, and restrictions embodied in the vast mass of Federal laws relative to the use and expenditure of public funds from current appropriations. (See *Cameron* v. *Weedin,* 226 Fed. 44.) Both the Secretary of the Navy and the Comptroller General of the United States have directed appellant to not pay appellee in excess of 80 per centum of his pay and

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to credit his overpaid account with the remaining 20 per centum. The decision in *Pested* v. *Abbey, supra,* is doubly applicable and the petition should have been dismissed by the court below on the authority of said case even if the principles hereinbefore and hereinafter discussed were not present.

The absolute authority committed by the express terms of statutes to the accounting officers in the settlement of all accounts and claims payable from general appropriations in which the United States are concerned and which settlements are conclusive on the executive departments should not be confused with the jurisdiction of the Courts to render judgment in a proper case against the United States. Such judgments are not payable from the general fund in the Treasury because of the provision of Article I, section 9, of the Constitution nor are they payable from general appropriations. It has been provided by the acts of September 30, 1890 (26 Stat. 537), that all judgments against the United States shall be certified to Congress for specific appropriation and by the act of February 18, 1904 (33 Stat. 41), that payment thereof shall be made by the accounting officers from the specific appropriations if and when made.

Where the Court has jurisdiction of a suit for or against the United States, the settlements of the accounting officers establish a prima facie case (*United States* v. *Pierson,* 145 Fed. 814; *United States* v. *Fidelity Company,* 150 Fed. 550; *United States* v. *Du Perow,* 208 Fed. 895), but are not con-

clusive on the courts (*United States* v. *Gilmore,* 189 Fed. 761), unless a statute makes them so (*United States* v. *Babcock,* 250 U. S. 328).

What the Court below did in effect was to take jurisdiction through what appellant believes to be a misconception of the law and render judgment against the United States for the withheld pay of appellee which had been earned and for pay which he had not but may earn in the future and to direct payment from general appropriations that have been or that may hereafter be made by Congress, and this without passing upon or giving judgment in favor of the United States in the way of counter-claim or set-off of the erroneous payments on the debit side of appellee's account and by reason of which the sums were withheld from the pay of appellee. It is submitted that such action can not be defended either upon principle or authority.

III

The court had no jurisdiction to direct issuance of a writ of mandamus requiring the salary of a naval officer to be paid from general appropriations

A mere reference to the act of June 10, 1922 (42 Stat. 625 to 633), entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," is sufficient to demonstrate the determination of the amount of pay and allowances due a naval officer requires the exercise of discretion, Section 1 therefore assimilates

the pay of all commissioned officers of the services named in the title of said act according to the grade held and length of service in the grade and total length of service. Appellee is a lieutenant commander and as such is entitled to one of three different rates of pay in his grade. Also his right to subsistence and rental allowances depends upon the rate of pay, character of service, whether he has dependents, and whether he or his dependents have been assigned quarters. The terms of the current general appropriation act from which appellee demands his pay and allowances when they shall have been determined in accordance with the act of June 10, 1922, *supra,* and the terms of the general appropriation act from which *Brashear* demanded his pay in 6 Howard, 93, are here quoted in juxtaposition for comparison of their terms:

The general appropriation act of March 3, 1845 (5 Stat. 790), appropriated funds—

"For pay of commission, warrant, and petty officers, and seamen, including the engineer corps of the Navy, two million five hundred and nine thousand one hundred and eighty-nine dollars."

The general appropriation act of May 28, 1924 (43 Stat. 182), under the heading "Pay of the Navy," provided funds, page 193:

"For pay and allowances prescribed by law of officers on sea duty, and officers on waiting orders—pay, $26.431,298; rental allowance, $5.438,284; subsistence allowance, $3,331,700; in all, $35,201,282."

The Supreme Court said in the *Brashear case* that—

> Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it.
>
> The Secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be appropriated among the parties entitled to it.
>
> These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the government, to the payment of whose demands the particular fund is applicable, are interested, as well as the government itself. At most, the Secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned.
>
> It will not do to say that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for upon

> this ground any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common in the enforcement of demands upon the government as the action of assumpsit to enforce like demands against individuals.

Neither the appropriation act of March 3, 1845, nor the appropriation act of May 28, 1924, nor indeed, any other appropriation act, fixes the amount of pay that shall be paid to a Navy officer. Such salaries have been fixed from time to time by the terms of general statutes on the basis of grade held, length of service, etc., and the reports of decisions of the Court of Claims and many of the reports of the United States Supreme Court contain many opinions as to the proper construction of said laws.

It would appear to be obvious that the statement of the court below, "the salary of Hetfield, which is definitely fixed by statute, is made payable monthly in the sum of $365.75," is not in accordance with the law and that the further statement "the duty of respondent in paying and disbursing such salary to an officer is purely ministerial" is in direct conflict with the decision of the Supreme Court in *Brashear* v. *Mason, supra.* It is also in direct conflict with the decision of the same court in *Decatur* v. *Paulding* (14 Peters, 497). In this case an application had been made for a writ of mandamus to the Secretary of the Navy to compel him to

make payments to the widow of an officer of the Navy of certain pay on account of the officer. Chief Justice Taney, who had been both Attorney General of the United States and Secretary of the Treasury and thus familiar through actual experience with the financial machinery of the United States, rendered the opinion of the court, affirming the lower court in its refusal to grant the writ. He said, among other things, that—

> If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. *But their judgment upon the construction of a law must be given in a case in which they have jurisdiction,* and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. (Italics supplied.)

The case before us illustrates these principles and shows the difference between ex-

ecutive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment in deciding whether the half-pay allowed her was to be calculated by the pay proper or the pay and emoluments of an officer of the Commodore's rank. And after all this was done he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress requiring the exercise of so much judgment and investigation can, with no propriety, be said to command a mere ministerial act to be done by the Secretary.

The decision of the Supreme Court in *Work* v. *Mosier et al.* (261 U. S. 352) is a late expression of the court on the subject of ministerial and discretionary duty. Said case is a much stronger case than the one at bar for the appellee for the reason that it concerned Indian moneys

which were deposited in the Treasury pursuant to statute to the credit of a trust fund for the Indians and could be drawn upon from time to time by the Secretary of the Interior without the interposition of Congress. In other words, the Constitutional prohibition in Article I, Section 9, was not present in the case. There the statutory direction to the Secretary to pay the parents the income due to the minors was clear and positive subject to the provision that the money could be withheld if the Commissioner of Indian Affairs should become satisfied that the money was being squandered or misused. The lower court granted a writ of mandamus requiring the money to be paid, and this action was reversed by the Supreme Court. which said:

> Subject to the construction we have put upon the statute, the discretion is vested in the Commissioner to determine in each case whether in his judgment there has been misuse or squandering, and within the same limitation, to decide what is misuse or squandering. Until he has had a full opportunity to exercise this discretion, neither he nor the Secretary can be compelled by mandamus to make the payment, and if in its exercise he does not act capriciously. arbitrarily, or beyond the scope of his authority, the writ will not issue at all.

Here there is not only a Constitutional prohibition against moneys being drawn from the Treasury

save in consequence of appropriations made by law and the accounting officers are the authorized officials to determine the availability of general appropriations, from which appellee must be paid if at all, but the statutes of the United States will be searched in vain for a "clear and positive" direction to appellant or any other Naval disbursing officer to pay appellee or any other Naval officer his pay or any part thereof.

The court below relied on *Smith* v. *Jackson* (246 U. S. 388) as authority for granting the petition in this case. For comparison there is quoted in parallel columns the terms of the appropriation act in the Smith case and the terms of the appropriation act from which appellee demands his pay:

The Sundry Civil act of March 3, 1915 (38 Stat. 883), appropriating funds for the Panama Canal Zone for the fiscal year 1916, provided:

"For Civil government of the Panama Canal and Canal Zone. salaries of district judge $6,000. district attorney $5,000. marshal $5,000." etc.

The Naval appropriation act of May 28, 1924 (43 Stat. 182), appropriating funds for the Navy for the fiscal year 1925, provides:

"For pay and allowances prescribed by law of officers on sea duty and other duty, and officers on waiting orders—pay, $26,431,298; rental allowance, $5,438,288; subsistence allowance, $3,331,700; in all, $35,201,282."

The distinction between the *Smith case* and the case at bar is apparent. In the *Smith case* the salary of the judge was appropriated in a fixed sum of $6,000 for the fiscal year and in the case at bar lump sums of $26,431,298 are appropriated for salary, $5,438,288 for rental allowances, or allowances in lieu of quarters, and $3,331,700 for subsistance allowances or a total of $35,201,282 for all of the thousands of commissioned officers in the Navy. Furthermore, in the *Smith case* there was no necessity for referring to and construing the terms of some permanent law and of making computations to determine the amount of the judge's salary, whereas in this case, and as hereinbefore pointed out, it is necessary to refer to and construe the act of June 10, 1922 (42 Stat. 625, 633), and other statutes and to make calculations thereon to determine the pay and allowances of appellee. There is nothing in the opinion of the Supreme Court in the *Smith case* to indicate an intention of said court to overrule its prior opinions and decisions in the *Decatur, Brashear*, and *Guthrie cases*, and it is clearly distinguishable from said cases. The Circuit Court of Appeals pointed out in the *Smith case* (241 Fed. 747), quoted by the court below in this case, that "we think * * * the proper construction of the statute is clear and the salary should have been paid." The statute in the *Smith case* needed no construction, for the act of March 3, 1915, specifically appropriated: "Salaries of district judge, $6,000," etc.

It requires no argument to demonstrate that the statute in the instant case necessitates construction, for the Act of May 28, 1924, appropriated " pay and allowances prescribed by law of officers on sea duty and other duty, and officers on waiting orders, pay $26,431,298," etc. We are required, nay compelled, to go back to the act of June 10, 1922, and other applicable statutes to determine what is the rate of sea pay, waiting order pay, and other pay of officers of the Navy of any grade and then to compute the length of service, etc., to state the account of any officer in any of the various grades from the lowest of ensign to the highest of admiral. It would appear to be too clear for argument that the court below erred in following the inappropos decision in *Smith* v. *Jackson*, and in failing to follow the *Decatur, Brashear* and *Guthrie cases* which are squarely in point.

Furthermore, the *Smith case,* involved the salary of a judge, and all lawyers willingly admit that the independence of the judiciary demands that their salary be not diminished while the judges are in office. No such argument applies to the salary of a naval officer or other employees of the United States, as the Supreme Court recognized in the cases of *Gratiot* v. *United States* (15 Peters, 336); *McElrath* v. *United States* (102 U. S. 426); *United States* v. *Burchard,* (125 U. S. 176); and in *United States* v. *Stahl* (151 U. S., 366). In the *Burchard case*, for instance, erroneous payments were made

by a disbursing officer and all of the payments had been passed to his credit by the accounting officers. It was subsequently discovered that Burchard had been erroneously paid in part and upon a correct statement of his account the United States was allowed judgment on its counterclaim for the debit balance, the overpayment. The court there said, among other things, that—

> * * * in reality the account had never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be properly credited and properly charged against the credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of the law and he has no right to keep what he has thus obtained.

This is but a recognition and application of the well-settled principle of law that payments of public money made by officers or agents of the United States through either mistakes of law or fact may be recovered to the United States. (See *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190.) The Court of Claims in a recent decision in *Woog* v. *United States* (48 Ct. Cl. 80) went further and after a review of the authorities held that the United States could withhold the pay of an officer of the Marine Corps, which is a part of the Navy, to apply on the officer's indebtedness to a post exchange—a voluntary association composed of offi-

cers and enlisted men to supply and sell goods of various kinds to troops. The court there said:

> Considering all the circumstances and the tenor and scope of the decisions of the court of last resort, this court is of opinion that it was competent for the proper marine superiors and the accounting officers of the Treasury to withhold payments of plaintiff's intestate accounts until the officer or his representative should establish that the money committed to his care was not lost by or through fault or negligence of such custodian.

A full statement of facts in the *Smith case* is contained in 241 Fed. 747. The attention of this court is again particularly invited to the sections of the Code for the Canal Zone quoted on page 752 of said decision as to the authority of the District Court for the Canal Zone to direct issuance of writs of mandamus. Said sections confer far greater authority on said court than is conferred on United States District Courts by Section 716, Revised Statutes.

Furthermore, as shown from the statement of facts in the courts below, the Auditor for the Canal Zone, termed by the Supreme Court an accounting officer, was not an accounting officer within the meaning of the Ordinance of 1778, acts September 2, 1789, March 3, 1817, July 31, 1894, or June 10, 1921, *supra*. In other words the Auditor for the Panama Canal was

not a part of the accounting system of the United States, as was expressly pointed out in 241 Fed. pages 757 to 760. On the contrary, he was an administrative examiner of accounts such as is common to all of the departments and establishments of the Government, and certain claims and accounts examined by him were required by the act of October 22, 1913 (36 Stat. 209), to be settled by the Auditor for the War Department, one of the Treasury auditors, and now a part of the General Accounting Office. The courts below in the *Smith case* expressly declared page 760:

> I find no law making it incumbent upon the Auditor for the War Department to audit the salary of this relator, and there is nothing to show that, in the absence of statutory authority, this official had any authority to pass upon or to audit such salary.

The court had elsewhere declared in the opinion, page 759, that the question of the statement of the account of the judge had been improperly presented to the Comptroller of the Treasury who had no authority to pass upon it. In other words, the express language of the opinion shows that the court was considering a case where an administrative officer, similar to the disbursing clerk and Chief of the Division of Accounts in the Department of Justice, was withholding the salary of a judge which had been expressly appropriated in a lump sum per annum and, page 769, where "there was an absence of authority on the part

of anyone to make such a charge." The opinion of the Supreme Court on appeal must be read in connection with the facts, and when so read it is clear that it is not authority for the action taken by the court below in this case where the Comptroller General not only has the undoubted right but the legal duty to audit and state the appellee's pay account and the appellant's disbursing accounts and who because of a duty imposed on him by the express terms of Section 4 of the act of July 31, 1894 (28 Stat. 206), to superintend recovery of all balances certified by him to be due to the United States has denied authority to appellant to make the payment demanded.

That there may be no doubt in this matter, the attention of the court is invited to *Parish* v. *MacVeagh* (214 U. S. 124). There the Auditor for the War Department (one of the former accounting officers of the Treasury who was charged with the settlement of the accounts of the War Department), pursuant to an express statute conferring on the Secretary of the Treasury authority to settle a certain case "in accordance with the evidence collected by the United States Court of Claims," had examined the claim, found a balance due the claimant, and had issued a certificate of settlement for the sum found due. Thereupon it became the duty of the Secretary of the Treasury to issue a warrant for the certified balance, which warrant would then be for the countersignature of

the Comptroller of the Treasury. However, the Secretary refused to issue a warrant and it was held that a mandamus would issue to compel him to do so. Here it is to be noted that the jurisdictional statute of the Supreme Court of the District of Columbia is more comprehensive than section 716, Revised Statutes. The court expressly referred to the fact that the Treasury auditor had stated the account and, according to the well-settled Treasury Department practice and the law, all that the Secretary of the Treasury was required to do was to write out a warrant.

The decision of the court was entirely consistent with the decisions in the *Decatur, Brashear,* and *Guthrie cases* hereinbefore cited for the reason that the officials chargeable by law with the determination of availability of appropriations and the settlement of claims chargeable against available appropriations had not refused to pay the claim as they had in *United States* v. *Lynch* (137 U. S. 280), and as they have refused here to pay appellee in excess of 80 per centum of his pay because in the statement of his account they have found a debit balance due the United States.

Prior to the recent District Court cases of *Dillon* v. *Gross* (299 Fed. 851) and *Howe* v. *Elliott* (300 Fed. 243), the right of the accounting officers of the United States to offset overpaid items against credit items in the statement of the account of an officer of the Army, Navy, or Marine Corps had not been seriously questioned since the act of

1828, now section 1766, Revised Statutes, and the act of 1817, now section 305 of the act of June 10, 1921. The action of the court below and the action of the District Courts in the *Dillon* and *Howe cases,* if finally sustained, will not only overturn the accounting procedure in existence since the Ordinance of September 26, 1778, of the Continental Congress but will create a serious condition of affairs.

The annual expenditures of the United States now amount to billions of dollars and are made by thousands of disbursing officers, duly bonded, stationed throughout the world. Funds are advanced to them on the books of the Treasury on warrants countersigned by the Comptroller General and every payment made by them is audited and settled and balances certified pursuant to sections 304 and 305 of the act of June 10, 1921, and as described in *McKnight* v. *United States* (13 Ct. Cl. 395) in the General Accounting Office. There are approximately 200,000 officers and enlisted men in the Army, 150,000 in the Navy and Marine Corps, thousands of others in the Coast Guard, Coast and Geodetic Survey, and in the Public Health Service in addition to the more than 300,000 civil officers and employees. Statements of account of these officers and employees are maintained by the General Accounting Office and overpayments and short payments have been and are being made to them by disbursing officers from time to time; the overpayments are debited and

the short payments credited when subsequently discovered and the Comptroller General certifies a debit or credit balance which is deducted or paid by disbursing officers.

However, payments by disbursing officers are in no sense final, but merely tentative, subject to subsequent settlement by the accounting officers, and if the United States is to be denied the right which is accorded to every citizen of the country of stating accounts and deducting overpayments from credits coming in afterwards an intolerable situation will be created and great expense and losses imposed on the Government as well as burdens on the courts. It is proper to state that as a result of the opinions of the courts below in this class of cases a United States disbursing officer of the United States Court for China is being sued in said court by the District Attorney of said court for sums withheld from his pay to liquidate an erroneous payment made to him on account of unauthorized travel and certified due the United States on statement of his account.

In view of the situation brought about by the seeming misapplication of the decision of the Supreme Court in *Smith* v. *Jackson*, the following language from the concurring opinion of Mr. Justice Catron in *Decatur* v. *Paulding* (14 Peters, pages 520, 521) is peculiarly apropos:

> But the great question was decided below, that the Court have jurisdiction and power

sanction since the foundation of the government and directly contrary to the law as contained in decisions of courts of competent jurisdiction.

The hereinbefore referred to Ordinance of September 26, 1778, of the Continental Congress establishing an accounting system under the Articles of Confederation, provided in part:

> That, where any person hath received public monies, which shall remain unaccounted for, or shall be otherwise indebted to the United States, or have an unsettled account with them, he (the auditor) shall issue a summons * * *, in which a reasonable time shall be given for the appearance of the party, according to the distance of his place of residence from the treasury, of which he shall notify the auditor.
>
> That, in case a party summoned to account shall not appear, nor make good assign, the auditor, on proof of service made in due time or other sufficient notice, shall make out a requisition * * *, which he shall send to the comptroller's office, where the same shall be sealed, and then it shall be sent to the executive authority of the state in which the party shall reside.
>
> That it be recommended to the several states to enact laws for the taking of such persons, and also to seize the property of persons who, being indebted to the United States, shall neglect or refuse to pay the same; notice thereof shall be given by the auditor to the executive authority of the re-

spective states, * * * under the treasury seal.

After the ratification of the Constitution and the organization of Congress, one of the first laws was the act of September 2, 1789 (1 Stat. 65), hereinbefore referred to, establishing the Treasury Department. Said statute required the Comptroller "to direct prosecutions for all delinquencies of officers of the revenue and for debts that are, or shall be, due the United States." The original statute did not make clear the procedure to be followed by the Comptroller, but the defect was remedied by the acts of March 3, 1795, and March 3, 1797 (1 Stat. 441 and 512), respectively, wherein it was made the duty of the Comptroller to "institute suit for the recovery of same," and on transcripts of the books of the Treasury the courts were required "to grant judgment and award execution accordingly." See *United States* v. *Pierson* (145 Fed. 814) and authorities there collated. The act of March 3, 1817 (3 Stat. 366), authorized and directed the accounting officers to settle and adjust all claims and accounts whatever in which the United States were concerned, whether as debtor or creditor, and the then First Comptroller was directed to "take all such measures as may be authorized by law to enforce prompt payment of all debts due the United States."

The requirement that the accounting officers settle and adjust all claims and demands whatever in which the United States are concerned, whether

as debtor or creditor, now forms section 305 of the Budget and Accounting Act of June 10, 1921 (42 Stat. 24), and section 4 of the act of July 31, 1894 (28 Stat. 207), as amended by the Budget and Accounting Act of 1921, contains the requirement that the Comptroller General, whose office has succeeded that of the former auditors and Comptroller of the Treasury, "shall superintend the recovery of all debts finally certified by them to be due to the United States." The settlements of the accounting officers of the United States are conclusive on all executive officers as to the availability of general appropriations but as to their legal correctness they are not conclusive on the courts unless a specific statute governing the class of cases makes them so. See *United States* v. *Babcock* (250 U. S. 328), where it was held that a settlement of a particular class of cases was conclusive on the courts.

However, when a court of competent jurisdiction disagrees with the accounting officers and renders judgment against the United States, such judgment can not be paid from the general fund in the Treasury because of Article I, section 9, of the Constitution, nor from general appropriations made by Congress but must be specifically appropriated for pursuant to the act of September 30, 1890 (26 Stat. 537), and paid on settlements of the accounting officers pursuant to the act of February 18, 1904 (33 Stat. 41). In other words, such settlements are

conclusive on the courts in so far as availability of general appropriations are concerned. Here the distinction between the jurisdiction of the accounting officers and of the courts clearly appears, the distinction being that the accounting officers settle and adjust "all claims, demands, and accounts whatever," unless the particular class is excepted by statute and pay the credit balance from any general appropriation that may be available while the courts settle only limited classes of cases against the Government as to which the consent of the United States to be sued has been expressly given and the judgments can not be paid until they have been reported to Congress for specific appropriations and the appropriations have been made. See *Collins* v. *United States*, 15 Ct. Cls. 35; *Reeside* v. *Walker*, 11 Howard 291.

Where the accounting officers find a balance due the United States, they are and have been required since the foundation of the Government to superintend its recovery. If suit is brought on any account settled by the accounting officers, Section 886, Revised Statutes, authorizes the courts "to grant judgment and award execution accordingly." This requirement has been construed by the courts to mean that a settlement of the accounting officers establishes a prima facie case. (*United States* v. *Pierson*, 145 Fed. 814; *United States* v. *Fidelity Company*, 150 Fed. 550; *United States* v. *Du Perow*, 208 Fed. 895, but not a conclusive case; *Gillmore case*, 189 Fed. 761.) The statements of

District Judge Sheppard in *Dillon* v. *Groos* (299 Fed. 851) and of District Judge Lowell in *Marc* v. *Alexander* to the effect that the settlements of the accounting officers are ex parte matters and binding on no one are neither in accordance with the statutes nor with judicial precedents.

It has not been the practice of the accounting officers since the beginning of the Government to require the institution of suit to collect balances certified by them to be due the Government except where there was no money due or accruing to the debtor from the United States. In other words, they have exercised the right of set-off in the adjustment of accounts. In *Gratiot* v. *United States* (15 Peters, 336) an Army officer contended that sums due him as salary could not be set off against sums due from him on another account to the Government. The United States Supreme Court sustained the right of set-off and said, among other things, page 369, that—

> There is another instruction asked under this exception, in a complicated form, but which mainly turns upon the consideration whether the treasury department had a right to deduct the pay and emoluments of the defendant, as a general of the army and while he was chief engineer, by setting them off against the balance reported against him on account of his superintendency of Forts Monroe and Calhoun. In our judgment, the point involves no serious difficulty. The United States possess the general right to

> apply all sums due for such pay and emoluments to the extinguishment of any balances due to them by the defendant on any other account, whether owed by him as a private individual or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.

The consideration of the court is also invited to the hereinbefore cited decisions of the Supreme Court in the *Burchard, McElrath,* and *Stahl cases* and to the decision of the Court of Claims in the *Woog case* sustaining the right of set-off against salaries of Army, Navy, and Marine Corps officers. In *Taggart* v. *United States* (17 Ct. Cl. 322) the Court of Claims said that—

> Where a person is both debtor and creditor of the United States in any form, the officers of the Treasury Department, in settling the accounts, not only have the power but are required in the proper discharge of their duties to set off the one indebtedness against the other, and to allow and certify for payment only the balance found due on one side or the other. Section 1766 of the Revised Statutes so provides, and special provisions on the subject, to meet the case of judgments recovered against the United States "or other claim duly allowed by legal authority," are made by the Act of March 3, 1875, ch. 149. (1 Supplmt. to R. S., p. 185.) But the right of set-off in such cases

exists independently of those special enactments, and is founded upon what is now section 236 of the Revised Statutes, as follows:

"SEC. 236. All claims and demands whatever, by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury."

The duty of the accounting officers in matters of set-off has frequently been recognized by the courts. (*McKnight's case,* 13 C. Cls. R., 306, affirmed on appeal; *Bonnafon's Case,* 14 C. Cls. R., 489.) * * *

It is submitted that, pursuant to express provision of law, the Comptroller General of the United States is required to settle and adjust all claims and demands whatever in which the United States are concerned, whether as debtor or creditor, in so far as payment from general appropriations are concerned, that where a balance is certified due the United States the Comptroller General is required to superintend its recovery; that the method of this recovery may be by any lawful means in the discretion of the Comptroller General; that in event of suit, his settlements establish a prima facie case; and that he has the legal right, if in his discretion he deems such action expedient, to set off the indebtedness or require such set-off to be made by a disbursing officer against any credits accruing to the debtor from general appropriations, whether that debtor be a naval officer, as appellee here, or

any other officer or employee, not including judges of the United States. This is but the practice required and followed since the Ordinance of September 26, 1778, and recognized and enforced by the cited decisions of the courts until an apparent misconception and misapplication of the decision in *Smith* v. *Jackson* (246 U. S. 388) led to the recent decisions of the district courts on which appellee in part relies.

It is interesting and instructive to note that the United States Supreme Court in a unanimous decision of November 12, 1923, in *McConaughy* v. *Morrow* (263 U. S. 39), on practically the same state of facts and law as were involved in the *Smith case* but where the salary of a judge was not concerned, held that rental of quarters in the Panama Canal Zone could be offset or deducted from the salary of officers and employees of the United States occupying said quarters in the Canal Zone. One of the reasons for the difference in the conclusions of the two opinions is that the learned Chief Justice of the Supreme Court was at one time Secretary of War, in charge of the Panama Canal and familiar from actual experience with the law and the facts in controversy, just as in another day a Chief Justice of that great court had been both Attorney General and Secretary of the Treasury, familiar with the actual workings of the financial machinery of the United States, and refused to direct issuance of a writ of mandamus

against the Secretary of the Navy in *Decatur* v. *Paulding* (14 Peters, 496), requiring payment of money from a general appropriation. That experience no doubt prompted him to say in the course of his opinion that—

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief; and this power was never intended to be given to them. The court should not entertain an appeal from one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer, or guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

Reference has been hereinbefore made, pages 36 to 39, to the situation the United States finds itself in to-day by reason of the holding of the court below and other district courts that the United States has not the right which the Supreme Court has stated it has and which is possessed by all of its inhabitants, that is, the right of setting off balances due the United States from a naval or other officer, not including judges, against sums due from the United States to said naval or other officer.

V

The court had no authority to direct the issuance of a writ of mandamus to respondent requiring him to pay from general appropriations sums to petitioner withheld from his pay to apply on his indebtedness to the United States as determined by the General Accounting Office and the Comptroller General of the United States, and to continue the payment of his salary from said appropriations notwithstanding the indebtedness to the United States

The appellant has intrusted to his care as a trust fund a limited amount of public money to pay credit balances determined by the Comptroller General of the United States to be due to officers and enlisted men of the United States Navy and to make certain other payments authorized by law. When this limited amount of money has been exhausted, appellant can not secure additional sums from the general appropriations except upon the countersignature of the Comptroller General. Whether he secures the countersignature to appropriation warrant placing additional funds to his credit depends upon whether the Congress has or continues to appropriate such funds, and if so, whether appellant has discharged his duty in disbursing the advances made to him in accordance with the orders of the Secretary of the Navy and of the Comptroller General of the United States. The mandate of the court below can not operate to require Congress to appropriate sufficient funds to pay appellee his salary nor can it require the Secretary of the Navy to change or withdraw his order of August 11, 1924, nor can it require the Comptroller General to re-

state the account of either appellant or appellee or countersign an appropriation warrant placing additional funds to the credit of appellant.

It will not do to say that the mandate in this case is binding on the Comptroller General requiring him to surrender to the court below his sworn duty of auditing and stating accounts of naval officers in accordance with what he conceives to be the law, for where Congress has deemed it expedient that the accounting officers shall be bound by judicial precedents in the statement of any class of accounts, payable from general appropriations, express provision to that effect has been made by law. See, for instance, the act of June 7, 1924 (43 Stat. 486), requiring the accounting officers to state transportation accounts of land grant railroads in accordance with decisions of the United States Supreme Court.

This rule does not apply to judgments of the courts against the United States for which Congress has made specific appropriations in accordance with the act of September 30, 1890 (26 Stat. 537), and it may be conceded for present purposes that such a rule would not apply where Congress itself had adjudicated the claim and had appropriated a specific sum for the payment of a particular claimant or the salary of a particular officer or employee, as was the case in *United States* v. *MacVeagh* and *Smith* v. *Jackson, supra,* but even in those cases it is to be noted that the accounting officers of the United States either had no juris-

diction whatever, as in the *Smith case,* or had stated the account and certified a balance due as in the *MacVeagh case.* Furthermore, the jurisdictional statutes of the District Court of the Canal Zone and of the Supreme Court of the District of Columbia are more comprehensive than the jurisdictional statute of the court below.

Suppose Congress should not appropriate sufficient funds to pay the salary of appellee, or the Secretary of the Navy should transfer appellant and appellee to a station beyond the jurisdiction of the court below, or the Comptroller General, who is beyond the jurisdiction of the court, should refuse to countersign an appropriation warrant placing additional funds to the credit of appellant from which payment could be made, or appellant should conclude that appellee is entitled to a lesser rate of pay than that stated by the court in its memorandum opinion, what would be the rights of the respective parties and how would it be possible for the court below to enforce its mandate? These considerations alone are sufficient to show the error of the court below in assuming jurisdiction of the controversy and in directing the issuance of a writ of mandamus instead of dismissing the petition and informing appellee that he should sue the United States in the Court of Claims in accordance with the Judicial Code for whatever sum he believes the appellant illegally withheld from his pay. There is no jurisdiction in the courts even under a proper

jurisdictional statute, which appellant contends is lacking here and where the proper parties are before the court, to direct issuance of mandamus except to enforce a ministerial duty and where there is no other adequate remedy. The rule was summarized in *Ex parte Cutting* (94 U. S. 14) as follows:

> The office of mandamus is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance and who has no other adequate remedy.

This rule was reiterated in *Houston* v. *Ormes* (252 U. S. 469), where the facts were similar in all essential respects to the facts in *Parish* v. *MacVeagh;* that is, a specific sum of money had been appropriated to pay a particular person and the accounting officers of the United States had not determined that the appropriation was unavailable to pay the claim. In fact, in the *Ormes case,* the accounting officers had taken no action whatever. The proceeding was against the Secretary of the Treasury to require him to perform his ministerial duty of drawing a warrant chargeable to a specific appropriation and where there was no other adequate remedy. Here appellant has no power whatever to draw appropriation warrants; he can secure no funds for disbursement except upon appropriation warrants drawn by another official over

whom he not only has no control but to whom he is subject to control; and the appropriations for the current fiscal year do not appropriate a specific sum to pay appellee his salary and appropriations for subsequent fiscal years have not been made. In fact, Article I, section 8, of the Constitution prohibits the appropriation of money to the use of the military forces for a longer term than two years, and as a matter of practice of which this court will take judicial notice, appropriations are made only for one year, yet the court below directed the issuance of a writ of mandamus commanding appellant to pay appellee, a naval officer, his salary from time to time for an indefinite period.

It is submitted that the most the court below could have done would have been to require appellant in event he had sufficient funds for that purpose to pay appellee the sums theretofore withheld from his pay, but for reasons advanced and statutes and decisions hereinbefore cited the court did not have jurisdiction or authority to command even that much to be done.

CONCLUSION

Upon the whole case it is respectfully submitted that for the reasons stated the decree of the District Court was erroneous, and should be reversed; and that this case should be remanded to the District Court with instructions to dismiss the petition for

NO. 4451

In the Circuit Court of Appeals of the United States for the Ninth Circuit

E. H. BARBER, Naval Disbursing Officer,
Appellant

vs.

WILLIAM BRAWNER HETFIELD, Appellee

APPELLEE'S REPLY BRIEF

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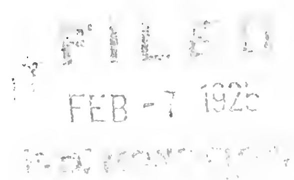

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In the Circuit Court of Appeals of the United States for the Ninth Circuit

E. H. BARBER, Naval Disbursing Officer,
Appellant

vs.

WILLIAM BRAWNER HETFIELD, Appellee

APPELLEE'S REPLY BRIEF

STATEMENT OF THE CASE

Appellant's statement of the facts of the case are acceptable as far as they go, but require some amplification.

What is termed by appellant, overpayments to appellee, arose as follows:

Appellee during the questioned period from April 22, 1919, to March 31, 1922, filed with the appropriate officer, claim or proof in the form required, requesting payments to him on account of his dependent mother. The payments were made.

The Comptroller General, whose position became existent in July, 1921, reviewed these dependency claims in March, 1924, held dependency not proved to his satisfaction, and without any

hearing being accorded appellee, arbitrarily declared the amount of these dependency payments owing from the appellee to the Government. The appellant forthwith refused to pay appellee any part of his pay as a Lieutenant Commander of the Navy declaring the so-called over-payments an offset. This drastic measure was modified to permit the payment of eighty (80%) per cent of appellee's salary, but the remaining twenty (20%) per cent is still being withheld.

This action was instituted to compel payment of the withheld twenty (20%) per cent.

ARGUMENT

The Point at Issue

We believe that there is but one point of law involved in this case, namely: **whether a Federal accounting officer can check against the pay of an officer whose position and compensation are created and fixed by Statute.**

APPELLEE'S PRECEDENTS

Our immediate precedents comprise what might be called the history of the Comptroller General's efforts to arrogate to himself all the functions of national government.

The **Dillon vs. Gross case (299 Fed. 851)** is identical in its issues with the case at bar, the **solitary** point of difference being that the petitioner in that case was a Lieutenant and in this case is a Lieutenant Commander. The Judge of the Dis-

trict Court of Florida before whom the mandamus fell, in a thorough and well reasoned opinion, granted the Writ prayed for on the groud, among others, that **"debts due the government may not be set off against the salary 'demand' of any officer, whose salary is fixed by statute."**

Complaining bitterly of outraged sovereignty, the Comptroller General insisted upon an appeal from the Florida District Court's decision, but the Solicitor General and the Attorney General held the decision good law and that an appeal did not lie.

Letter Attorney General to Secretary of Navy, of July, 1924, not yet reported.

HOWE VS. ELLIOTT

The Howe case (300 Fed. 243) before District Court in Florida, raised the same points as the Dillon case and the case at bar, and the decision followed the Dillon decision. The Court had the following to say concerning the attitude of the Comptroller General:

"The question seems to me to have been settled adversely to the position taken by the Comptroller General, in the instant case, by the opinion of the Attorney General rendered to the Navy Department. Why this opinion was ignored by the accounting officer is difficult to understand, in the light of the decision of the Courts in the case of Smith vs. Jackson decided in 1918 and referring

to Benedict vs. United States, 176 U. S. 357, decided in 1900."

COX VS. COMPTROLLER

Undaunted by the accumulation of precedents against him, the Comptroller ignores them, and we find him, defendant in person, in the Cox case (rendered by Supreme Court of District of Columbia December 1, 1924, and not yet reported), raising the same points of contention that were raised in all the other cases, including the case at bar. Again for the fourth time he is told by courts of the United States that he is acting **contrary to law** in checking against officer's pay. And yet we find him endeavoring to convince this Court that there are technical reasons, aside from the only point at issue, which prevent the court below from passing upon the issue.

OPINION OF SECRETARY OF THE NAVY

Alnav 24, under date August 11, 1924, reads in part as follows:

> "THE SECRETARY OF THE NAVY IS
> "OF THE OPPINION THAT THE HOLD-
> "ING OF THE SUPREME COURT OF
> "THE UNITED STATES IS DECISIVE
> "THAT THE SALARY OF OFFICERS
> "IS NOT SUBJECT TO OFFSET BE-
> "CAUSE OF CLAIMS OF THE GOVERN-
> "MENT. THE COMPPTROLLER GEN-
> "ERAL HOLDS THE CONTRARY
> "VIEW."

EARLIER PRECEDENTS

Smith vs. Jackson, 241 Fed. 746; 246 U. S. 388: In that case, which has also a mandamus proceeding, a paymaster in the Canal Zone refused to pay the salary of a judge of the Canal Zone Court, claiming the right to offset against the salary, moneys due from the Judge on account of rental of a government house. The court held, in a very exhaustive and well reasoned opinion, that an accounting officer of the United States government cannot check or offset against a salary created by statute, and that the payment of the salary was a ministerial duty and mandamus-able.

The Attorney General, (as in the **Dillon case** (supra)) called upon, for an opinion as to the soundness of the trial court's decision, approved the decision. (20 Ops. Atty. Gen. 626). As in the case at bar, despite the valuable advice of the Attorney General, an appeal was taken which the Supreme Court of the United States, in adopting the lower court's decision, designated frivolous and declared was a proper cause for penalizing, were it not believed the accounting officer was acting in good faith.

In the case of **Loisel vs. Mortimer, 277 Fed. 882,** a clerk of a United States District Court, sought of the District Court in Louisiana a mandamus to compel the United States Marshall to pay his salary, which the Marshall was withholding and offsetting against moneys due the government from

Mortimer. The Court granted the Writ on the ground that such checkage was against law and that the payment of an officer's salary was a ministerial act and could properly be compelled by mandamus.

DISCUSSION OF POINTS OF APPELLANT'S ARGUMENT

Having very briefly called the Court's attention to the precedents upon which appellee based his action, we will now proceed to discuss as briefly as possible, the points appellant has raised in his brief:

Appellant's points, as we read them, are as follows:

1. That appellee's petition for a Writ fails to disclose any ground giving the District Court jurisdiction of the case.

2. That the suit is one against the United States and therefore can only be brought in the Court of Claims where the United States consents to be sued.

3. That Sec. 24 of the Judicial Code denies to District Courts jurisdiction over suits to recover fees, salary, etc., and that the present case is such a suit.

4. That the Courts have refused jurisdiction by mandamus over Federal officials.

5. That the Court cannot compel appellant to pay appellee's salary, because it would re-

quire a special appropriation and a warrant countersigned by the Comptroller.

6. That the lower Court lacked jurisdiction to issue writ because act of Comptroller in fixing salary of appellee is one of discretion.

7. That pay of Naval Officer is not fixed by statute.

8. That appellant and Comptroller have a legal right to check against pay of a Naval Officer.

9. That Smith case is not in point because auditor of canal zone was not such an accounting officer as had power to pass on salary claims.

10. That prior to Dillon and Howe cases right of accounting officers to offset overpaid items in the statement of the account of a Navy or Army Officer was never seriously questioned since 1828.

APPELLANT'S FIRST THREE POINTS

The first three points raised by appellant, as enumerated hereinabove, will be answered under one head.

The lower court properly acquired jurisdiction of the cause at bar by virtue of Sec. 24 of the Judicial Code, paragraph 14, which gives to District Courts original jurisdiction

> "of all suits at law or equity authorized by "law to be brought by any person to redress "the deprivation. * * * of any right, priv-

"ilege or immunity secured by the Con-
"stitution of the United States."

In **Dillon** vs. **Gross** (supra), the Court referring to the effect of the Comptroller General's action, said:

> "The more serious question would be "deprivation of relator's property in vio-"lation of his constitutional rights."

This action is not one against the United States. It is an action against an officer of the United States who is violating another's constitutional rights, by an ultra vires and illegal act. A suit to compel a government official to perform **a ministerial** duty is not a suit against the United States.

> **Works vs. U. S. 298 Fed. 893.**
> **Kendall vs. U. S. 12 Peters, 524.**
> **Loisel vs. Mortimer, 277 Fed. 882.**
> **Louisville Cement Co. vs. Interstate Com. Com., 246 U. S. 638.**

This is not a suit to determine and recover compensation or salary, on the part of the officer. The amount of pay and the fact that pay was earned, are not even an issue. While called a mandamus, it amounts in fact and substance to this, that it seeks to enjoin the appellant from **illegally** attempting to offset against a part of appellee's salary, moneys which the Comptroller claims appellee owes the United States.

It is not even a question of whether or not ap-

pellee in fact was improperly paid on his dependency claims, it is purely a question as to whether or not alleged indebtedness of appellee to the United States government can be offset against his statute-given salary.

Appellant cites **Decatur vs. Pauling, 14 Peters, 497, Brashear vs. Mason, 6 Howard, 93,** and **U. S. vs. Guthrie, 17 Howard, 284,** in support of his contention that the courts have refused to take jurisdiction of mandamus of government officials. But in each of the cases cited the court held that it lacked jurisdiction, not because of the subject matter or the character of the action, but because the facts in each case disclosed that the act sought to be compelled was one involving discretion.

In **Brashear vs. Mason** there was a question as to whether the petitioner was entitled to pay at all. He was an officer of the Texas Navy and when the United States annexed the Texas Navy petitioner contended he automatically became a part of the United States Navy and entitled to pay. The court held it was a matter within the discretion of the Secretary of the Navy.

In **Decatur vs. Pauling,** the widow of Stephen Decatur of Tripoli fame, endeavored to compel the Secretary of the Navy to pay her a pension, when that official denied she was entitled thereto. The court held that the exercise of discretion was involved.

In **U. S. vs. Guthrie** a judge who had been re-

moved endeavored to try the title to the office and to recover salary of the office. Court held exercise of discretion involved.

All of the above cases can be reconciled with **Smith vs. Jackson,** (supra). If not reconcilable **Smith vs. Jackson** reverses them.

It requires no efforts at reconciliation to discover that **Smith vs. Jackson, Loisel vs. Mortimer, Dillon vs. Gross, Howe vs. Elliott** and **Cox vs. Comptroller,** are identical in order of facts and application of the law.

APPPELLANT'S CONTENTION THAT MANDAMUS IS NOT ISSUABLE BECAUSE IT WOULD REQUIRE A SPCEIAL APPROPRIATION.

While it is probably true that a judgment against the United States would have to be paid from a special appropriation, such rule is not applicable here. No judgment against the United States is involved but simply an order compelling a ministerial act of an officer. As appears from appellant's brief (on p. 28 thereof) the pay of Naval Officers is taken care of by a blanket approportion **and the salary of officers for the fiscal year 1925 is provided for by Naval Appropriation Act of May 28, 1924.**

The order of the court below is to require the paymaster to pay the salary of the officer as contemplated by the appropriation act, without withholding any part thereof.

APPELLANT'S CONTENTION THAT MANDAMUS DOES NOT LIE BECAUSE COMPTROLLER'S ACT OF FIXING THE SALARY IS A DISCRETIONARY ONE.

For the purpose of this appeal the allegations of the petition must be assumed as true. The paymaster did not refuse payment on the ground that appellee was entitled to no pay, or that under the act of June 10, 1922 it was difficult to determine how much pay he was entitled to. Appellant's ground of withholding the pay, was that the Comptroller General instructed him to offset or check against the pay, amounts which the Comptroller General believed were improperly paid during the years 1919-22.

The pay of appellee depends, of course, on his rank, years in service and character of service. It is to be remembered that it is pay only that is sought here. Once you have those **statistics** anyone could **calculate** the amount of the officers pay.

The payment of the salary of a government official by a government accounting officer is a mere misiterial act.

> **McAdoo vs. Owens 47 D. C. (App.) 364.**
> **20 Opinions, Attorney General, 626.**
> **Smith vs. Jackson, 241 Fed. 746; 246 U. S. 388.**

"The fact that the officer must construe an act

of Congress in ascertaining his duty, does not render it other than ministerial.

Loisel vs. Mortimer 277 Fed. 882.

"In**Works vs. U. S.** 298 Fed. 893 the Court in discussing this point said: "We are called upon therefore to review merely the interpretation based upon the statute by the Secretary and not to review an adjudication based upon issue of fact."

If we followed the appellant's reasoning, as the Court pointed out in **Smith vs. Jackson (241 Fed. at 762),** "Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of his duty involved an interpretation of the statute by him and therefore it was not ministerial and the Court would on that account be powerless to give relief."

We are constrained to look upon this point of appellant's brief, as an indication, at least, of a lack of that good faith which an official of the government should hold toward lesser officials.

On page 21 of his brief appellant complains that the judgment appealed from is unfair because it requires payment of full salary to appellant without giving the government a hearing on its counterclaim or alleged offset. And yet he sees no injustice in, not only after four or five years reviewing appellee's showings of mother depend-

ency and rejecting them, but even going to the extent of withholding the amounts of the payments thereon, from appellee's salary, without the suggestion of a hearing on the dependency facts.

The judgment of the lower court denies the paymaster or the Comptroller General or the United States Government nothing. It simply says to the two former: you cannot check against the salary of a Federal officer whose pay is fixed by statute, because such action is contrary to law.

We wonder, if the Comptroller General should discover that one of two officers entitled under the act to the identical pay, was not worth his pay, whether he would pay the one and instruct his paymaster to withhold the other's pay and resist mandamus on the ground that he was the supreme accounting officer of the Government and was merely exercising his discretion.

Appellant's point numbered seven herein, is not worthy of consideration.

APPELLANT'S CONTENTION THAT HE AND COMPTROLLER GENERAL HAVE A RIGHT TO CHECK AGAINST PAY OF A NAVAL OFFICER.

This point we have covered sufficiently we believe, under the head of "Precedents," including a discussion of the Smith, Dillon, Mortimer and Howe cases.

We find on page 31 of his brief, appellant argues

that overpayments or payments made to public officers in error can be recovered by the United States, and then quotes from the Burchard case (125 U. S. 176), a point of decision that an officer who receives overpayments has no right to keep them. **In that case the United States was allowed a judgment on its counterclaim.** But here the Comptroller General is not seeking, on behalf of the government, a return of moneys by suing out a counterclaim. He simply deducts the amount of his arbitrary findings from the pay of the Naval Officer in California or China and says to the officer: "If you believe I am in error, buy yourself a ticket, wire for hotel accommodations, come to Washington, hire a strange lawyer and see if you can make me pay."

And if the officer can raise the money to go to Washington, and file his suit there, and pay his attorney's fees, and the like, he will probably find that he lost money in seeking back from his government money wrongfully and illegally withheld.

However, this point also was covered in our early citations.

APPELLANT'S CONTENTION THAT SMITH CASE WAS NOT IN POINT BECAUSE ACCOUNTING OFFICER IN THAT CASE HAD NO SUCH POWER AS HAS COMPTROLLER GENERAL IN THIS CASE.

Appellant draws many fanciful distinctions be-

tween the Smith case and the cases which later accepted it as a leading case, all of which distinctions have escaped four United States District Courts, the Attorney General of the United States, the Solicitor General and the Secretary of the Navy.

These distinctions are (1) that the appropriations for the canal zone provided for the judge's salary, while the naval appropriation, in present case, was a blanket one covering pay of all Naval Officers; (2) that Smith case required no discretion, while present case does; and, (3) that accounting officer in Smith case was not an accounting officer in the sense the appellant is.

But the Smith case hinged on the point which had the Attorney General's support that even though the Judge owed money to the Canal Zone government for house rent, as his salary was fixed by statute, nobody could check against that salary the amount of the house rent, whether a first class accounting officer or a clerical auditor.

APPELLANT'S CONTENTION THAT PRIOR TO DILLON AND HOWE CASES THE RIGHT OF ACCOUNTING OFFICERS TO OFFSET UNPAID ITEMS ON THE STATEMENT OF THE ACCOUNT OF A NAVAL OR ARMY OFFICER WAS NEVER SERIOUSLY QUESTIONED SINCE 1828.

We find this astonishing point stated on page 35 of appellant's brief. Following such a preface

we naturally expected such an array of citations as to make the Smith vs. Jackson, Loisel vs. Mortimer, Dillon and Howe cases seem inconsequental.

But we were doomed to disappointment. There are no citations under this head. Elsewhere in the brief, however, we find a citation which, standing alone, might lend support to this point.

On page 311 we find **Woog vs. United States, 48 Ct. Cls. 80,** cited, which holds that the United States could withhold the pay of an officer of a Marine Corps, until he settled his shortage in funds entrusted to him as treasurer of a post exchange, which appellant at bottom of page 31 of his brief calls a voluntary association of officers and enlisted men, but which the decision stated specifically "**is not** a voluntary association." The court held that the officer was a trustee for the United States and the accounting officer was warranted in holding back pay until trust funds were accounted for.

So the only case cited on this point we were able to discover in appellant's brief is not in direct support thereof and is a weak authority to stand in company with two Attorney General's opinions, a Supreme Court decision and numerous District Court decisions.

Appellant makes some point of the fact that should moneys in hands of the formal appellant become exhausted before appellee's withheld pay can be delivered him, appellant could not carry

out the court's order unless the Comptroller General countersigned a warrant for the remainder. We do not know whether this is an argument or a threat.

THE ORDER OF THE SECREATRY OF NAVY

After arguing that no money could be withdrawn from the Treasury without the consent of the Comptroller General or the Secretary of the Navy, on pages 17 and 19 of his brief appellant remarks that the withholding of appellee's pay was on an order of the Secretary of the Navy.

Appellant is doubtless referring to **Alnav 24** which directed to all disbursing officers, instructs them as follows:

> **"No disbursing officer shall withhold more than twenty per cent because of alleged overpayment.**

And before that on May 20, 1914, by radiogram numbered 0216 the Secretary of Navy specifically directed the appellant **"not to withhold any pay account commutation quarters or subsistence allowance pending instructions from department."**

But apparently the Machiavellian hand of the Comptroller appeared and induced the appellant to disregard the legal instructions of the Secretary of the Navy and regard and follow his own unjust and illegal advice.

CONCLUSION

Appellee earned his pay which no one denies.

His pay is fixed by statute and is in a definite figure. Appellant withholds appellee's pay relying upon instructions from the Comptroller General which are absolutely void and therefore as though never given. The money has been appropriated for all naval officers pay.

The lower court in keeping with justice and all legal precedent has ordered appellant to pay appellee's salary. Similar orders by similar courts have been disregarded. The appeal in this case appears to be one of a series of attacks on the integrity of the courts.

It is trusted that this Court will sustain the ruling of the lower court, thereby possibly compelling the Comptroller to recognize the constitutional rights of naval officers and restore the morale of the navy to its proper pitch.

Respectfully submitted,

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